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1821

REPORTS
OF
CASES
DETERMINED
IN
THE CONSTITUTIONAL COURT
OF
SOUTH-CAROLINA.

BY HENRY JUNIUS NOTT & DAVID JAMES M'CORD,

COUNSELLORS AT LAW.

VOL. II.

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1821.

DISTRICT OF SOUTH-CAROLINA.

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"Reports of Cases Determined in the Constitutional Court of South-Carolina, by HENRY JUNIUS NOTT & DAVID JAMES M'CORD, Counsellors at Law. Vol. II."

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JAMES JERVEY, *District Clerk of South-Carolina.*

Rec. May 12, 1885

PREFACE.

IT will be noticed, that a few cases have been inserted in this volume, taken from the MS. Reports of Mr. Justice Brevard. We regret exceedingly, that those reports were received by us at so late a period (though politely transmitted to us as soon as applied for) as to prevent us from making as extensive use of them as might be beneficial to the profession. The cases collected by the Judge, in four volumes, have been reported with great precision and correctness, with notes containing much learning and legal information; and should we continue the present work, extensive use will be made of them, as they contain a variety of cases of the greatest importance, decided by the Constitutional Court, of which no other record remains.

NOTT & M'CORD.

JUDGES
OF THE
CONSTITUTIONAL COURT
OF
SOUTH-CAROLINA,
DURING THE TIME OF THIS VOLUME.



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(a.)—Elected 11th December, 1819.

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CONSTITUTIONAL COURT

OF

South-Carolina, May Term, 1819—Charleston.

JUSTICES PRESENT THIS TERM.

ELIHU H. BAY,	RICHARD GANTT,
ABRAHAM NOTT,	DAVID JOHNSON,
CHARLES J. COLCOCK,	JOHN S. RICHARDSON.

STATE vs. HARDY MILES.

On an Indictment for inveigling, stealing, or carrying away, a negro slave from his owner or employer, it is not necessary to prove the act of *inveigling*, to consummate the felony of *stealing* or *carrying away*.

A legal possession of the owner is sufficient, without his having actual possession; as during the time, that the slave has run away, &c.

The Jury, in such a case, cannot find the prisoner guilty of *petit larceny*.

The act has made it a specific felony, without clergy.

THE defendant in this case was indicted for inveigling, stealing, and carrying away, a negro, from his owner and employer, Noah Michau.

It appeared, in evidence, that the prosecutor, Noah Michau, the owner of the negro, lived in Williamsburgh district. He had entered into an agreement with his brother, Alexander Michau, to let the negro work with him that year, and to divide the proceeds of their labour. The negro was in that situation when he was taken, or absconded. He was afterwards found in Charleston,

where he had been sold by the prisoner. The offence was laid to have been committed in Charleston district, and the indictment tried there at the January Term, 1819.—The defendant was convicted, and a motion for a new trial was made on the following grounds :

1st.—That the act contemplates two distinct offences : 1st. Stealing from the *owner* ; and 2nd. Stealing from the *employer* : And that in this case, the indictment was not supported by the evidence ; as the negro was in the possession of the *employer*, and not of the *owner*.

2d.—That the offence, if committed at all, was committed in Williamsburgh, and not in Charleston, district.

3d.—That the jury were authorized to find the prisoner guilty of *petit larceny*, under this indictment, and that the Presiding Judge ought to have instructed them to that effect.

Mr. Justice *Nott* delivered the opinion of the Court.

The clause of the Act of Assembly, under which the defendant has been convicted, or so much of it as it is necessary to notice, is in the following words: " All and every person and persons who shall inveigle, steal, or carry away any negro, or other slave or slaves ; or shall hire, aid, or counsel, any person or persons, to *inveigle*, *steal*, or *carry away*, as aforesaid, any such slave, so as the *owner* or *employer* of such slave or slaves, shall be deprived of the use and benefit of such slave or slaves ; or shall aid any such slave in running away, or departing from his master's or employer's service, shall be, and he and they is and are hereby declared guilty of felony, &c. and shall suffer death as felons, and be excluded and debarred of the benefit of clergy." (2 *Brev. Dig.* 245. *P. L.* 236.) It is manifest from the words of this act, that it was the intention of the legislature to make the stealing of a negro, whether from the master or employer, a capital felony. But whether in the latter case it must be so laid in the indictment, or whether it may not still be laid as taken from the owner, notwithstanding the quali-

fied property which the employer may have in him, is a question which it is not necessary now to decide; for in this case, the master had not parted with the possession of the negro. He had, indeed, entered into an agreement with his brother, that he should work with him for one year; but he was to work for the benefit of the master.— He was to receive the fruits of his labour, and not a stipulated price for his services. He was therefore literally in the service and employment of his owner.

2d.—It is admitted, that the evidence of the prisoner's guilt, was sufficient to authorize a conviction, if he had been indicted for a larceny, at common law; and that the selling of the negro in Charleston, was sufficient evidence of stealing, in that district, to subject him to a trial there, for such larceny. (1 Hales, P. C., 507.) But it is contended, that the offence created by this act, is in the nature of a compound larceny; and, that the act of stealing and carrying away must be accompanied with inveigling to consummate the felony; and as the inveigling, if any, was in Williamsburgh district, the defendant could only be tried there, and not in Charleston. To get at that conclusion, it is contended, that the word "*or*," in the act, should be changed into "*and*," so as to make it read "*inveigle, steal, and carry away*." That courts may take such liberty, is established by precedent; and that they should do it, is perhaps sometimes necessary. But I apprehend, it is never to be allowed, except where it is required by the obvious meaning and policy of the law; and much less ought such power to be capriciously exercised, where the tendency would be to impair or defeat the operation of a law. The object and policy of the act was to give the most ample protection to the most valuable species of personal property, owned in this country; and to effect that object, it became necessary to resort to terms suited to the nature of the property intended to be protected. Negroes, being intelligent creatures, possessing volition, as well as the power of locomotion, capable of being deluded by art and persuasion, as well as of being

compelled by fear or force, to leave the service of their owners, the phraseology of the act was aptly adapted to the nature of the offence. It made it equally penal to deprive a person of the services of his negro by whatever means it might be effected. To inveigle means nothing more or less than to entice, persuade, or decoy, by any artful or seductive means. It was intended, therefore, literally, as it is expressed, to embrace all who should either inveigle, steal, or carry away, such property; and that is the construction which has been uniformly given to the act, from the earliest recollection of the oldest member of this bench. Any other construction would render it utterly inoperative. It would only require the concert of two persons, one to persuade a negro to run away, and the other to receive him in another district, and then sell or convey him away, to elude entirely the penalty of the law; for, as neither had committed the several acts of inveigling, stealing, and carrying away, neither would have committed the crime intended to be punished. Such a construction would make stealing a negro a less offence than to aid him in running away, or departing from the service of his master; a distinction not to be found in the act, and therefore not to be supposed to exist.

Again, it is contended, that there must have been an actual loss of service to complete the offence; and as the stealing was committed in Charleston district, the negro must have absconded and left the service of his owner before he came into the possession of the prisoner.

But personal property is always considered constructively in the possession of the owner, unless he has voluntarily parted with it. And whenever one man disposes of the property of another, against his will, and when he has a right to its services, the law implies a loss of service.—Whether it be on Sunday, when every slave is exempt from labour, or on a holiday, when his labour is voluntarily dispensed with by the owner, or in the night, when he does not require his services, or when he has run away, and he cannot command them, is perfectly immaterial.—

Were it otherwise, there would be no settled law on the subject. Every case would present a complicated question of facts for the consideration of a Jury, accompanied with so many qualifications, exceptions, and distinctions, as would render the act almost a dead letter. All these questions, however, have already been so long and so often settled, that it requires nothing, but, that the decisions of our courts should be published, to preclude all arguments upon them.

3d.—The last ground may be considered as settled by the verdict; for, although, the Presiding Judge recommended to the Jury not to find the prisoner guilty of *petit larceny*, on account of the doubt which he entertained on the subject, yet, it was distinctly stated to them, that they might find the property of less value than twelve pence, and then this court might determine what judgment should be rendered upon that verdict; which would give the defendant the full benefit of the privilege which he claimed. But they thought proper to find a general verdict, which put an end to the question. I am, however, authorized by my brethren to state, that it is the opinion of a majority of the court, that if the jury had found such special verdict, judgment of death must have been rendered. The act declares, that any person who shall be convicted of stealing a slave, shall be adjudged guilty of felony, and suffer death, without benefit of clergy; and as the penalty is annexed to the specific offence, the value of the property is immaterial. Perhaps it is questionable, whether it is necessary to lay the property to be of any value, and, as has been remarked by one of my brethren, the legislature may make the stealing of a pin a capital felony.

The opinion of the court is, that the motion must be refused.

Justices *Bay*, *Colcock*, and *Johnson*, concurred.

Mr. Justice *Gantt*, dissenting, delivered the following opinion:

Dissenting from the opinion delivered in this case, I

will, very briefly assign some of the reasons upon which my opinion is formed.

The 2d ground, taken in the brief, "that the offence (if committed at all) was committed in *Williamsburgh*, and not in *Charleston* district," appears to me conclusive, in favour of the defendant.

The Grand Jury are sworn to enquire only for the body of the county, and cannot enquire of a fact done out of the county, for which they are sworn, unless particularly enabled by statute. The act of assembly here does not authorize it, consequently, the offence was cognizable only in the district where committed. See *Jacob's Law Dictionary*, title, Indictment. In 1 *Hale's P. C.* 507, it is said, offences must be enquired into, as well as tried, in the county where the fact is committed, yet, if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either, for the offence is complete in both. But for robbery, burglary and the like, an offender can only be indicted where the fact was actually committed.

The offence here charged, is made felony without benefit of clergy, and falls strictly within the reason of the class of cases last mentioned. The doctrine in relation to larceny cannot be resorted to, on the part of the state, for the mere purpose of proving a taking, which would subject the offender to an indictment in any court where possession of the goods was had, and considered as inapplicable in respect to the value of the goods. If correctly applied to prove the taking, it follows, in my opinion, that the Jury might find the value to be under twelve pence, and the party to be guilty of *petit* larceny only. But this I take to be a strained and inadmissible construction of the act, and that the law in relation to larceny has nothing to do with the case. In *H. P. C.* 203, it is said, that if upon not guilty pleaded to an indictment, it shall appear that the offence was done in a county different from that in which the indictment was found, the defendant shall be acquitted. Now, as the owner and employer of this slave

lived in Williamsburgh district, and the services of the negro were necessarily confined to that district, it follows that the offence could only be laid therein, and consequently the defendant, according to law, was entitled to an acquittal.

A negro who is absent from his master's service, and out of his possession, might, by possibility, so artfully conduct himself, as to be carried away without any criminal intent by the person who has him in possession. Under such circumstances could a felony be committed by the mere act of carrying away? The legislature evidently contemplated at the time of passing this act, that the offence could only be committed where the negro was, when taken, in the service of the master or employer; and the only correct reading of the act, in my opinion, is to say, that it designed to punish :

1st. The inveigling with a negro, so as to induce him to leave the service of the master or employer, and go off with the inveigler.

2d. Where a person shall steal and carry away a negro, whereby the master or employer is deprived of his service.

To inveigle with, or steal a negro, without carrying away, would not subject the party to the penalty; because the owner or employer has not been deprived of the use and benefit of the slave.

Negroes have volition. It was seen that a certain description of them could not be stolen and carried off without their assent—such come under the first description of cases. Others, against whom force might be applied, and taken off, *volens*, fall within the latter description. In the particular case, if the negro (who was a runaway) had previously absented himself from the service of his employer, the defendant, by taking him into possession, and endeavouring to sell him, may, thereby, have paved the way to the owners re-possession and enjoyment of the benefit and services of the slave. The object of the law was to punish with death, where the conduct of the ac-

cused went to deprive the owner or employer of such benefit.

Penal statutes have ever received a strict construction. Under the sanction and force of this acknowledged rule, I am of opinion, that the proofs on the trial did not support the charge in the indictment. The act certainly contemplates two distinct species of taking, one from the owner, the other from the employer. Both are alike punishable with death. Where the legislature have drawn the discrimination, it is not for the court to say that it is unimportant. The reason why the law punishes, is, because the owner or employer is deprived of the service of the slave. Where is the injury to the owner, if an employer of a slave is deprived of his services, provided the slave is in place when the time of service has expired? I can see none. The negro was by contract in the possession of another, not the owner, and who was to receive one half of his services; hence the propriety of the discrimination taken in the act, and the necessity of the proof going to substantiate the count as laid. The owner of a slave put out to service could not support a civil suit, for deprivation of service, till the expiration of the time that the employer was to have him; *a fortiori*, an indictment under such circumstances, cannot be supported. Indictments like the present must have a precise and sufficient certainty. The place where the offence was committed, must be particularly set forth, and shown to be within the jurisdiction of the court, unless, as *Hawkins* says, in his 2d vol. of P. C. chap. 25, where the place is laid, not merely as a venue, but as part of the description of the fact; and in a case like the present, it would be most proper that it should be so laid. The offence, as laid in the indictment, has not been proved. The place where the offence was committed, and the person who has been deprived of the service, were proved on the trial, not to be as set forth in the indictment; and I have no doubt but according to established law in criminal cases, and especially in cases so highly penal as the present, the defendant could not under such circumstances, con-

sistent with law, have been found guilty. If the law is in favour of the defendant, I feel bound by its dictates, however much such a construction may militate against what is deemed the policy of the state. Judges may construe, but have no power to make, a law to fit the case. The business of legislation belongs not to the bench, and there is nothing in this act which warrants a departure from the established rule of construction in criminal cases of this nature. For these reasons, I dissent from the opinion delivered in this case.

Drinkin and Hunt, for the motion.

Hayne, Attorney-General, contra.



HENRY MIDDLETON *vs.* NATHANIEL HEYWARD.

On an action brought to recover freight for carrying rice to Charleston, in plaintiff's boat; defendant may give evidence of a custom of the River to look to the produce and to the consignee, alone, for freight.

THIS was an action, on open account, for the freight of rice belonging to the defendant, sent from his plantation to Charleston, in a vessel of the plaintiff's, and consigned to Messrs. Gadsden & Morris, the defendant's factors. The account was admitted, but the defendant offered parol evidence to prove a custom and usage of the river trade, in this state, to Charleston, whereby the carrier or ship owner undertook, on the receipt of produce, to look to the *produce* and to the *consignee* for payment.— The plaintiff objected to the proof of this custom, on the ground, that it was a custom contrary to law; which objection being sustained by the Presiding Judge, (Mr. Justice Johnson) the case went to the Jury without any testimony, on the part of the defendant, and a verdict was found against him for the amount demanded.

A new trial was moved for, on the ground, that his Honor,

the Presiding Judge, was incorrect in refusing to permit the defendant to prove the custom and usage.

Mr. Justice *Gantt* delivered the opinion of the Court.

In this case, the only point for the consideration of the court is, whether the defendant could legally have gone into proof of the custom and usage contended for. By the act of December, 1712, (*1 Brevard's Dig.* 136. *P. L.* 99.) making the Common Law of England of force here, exception is made to so much thereof as is "inconsistent with the particular constitutions, customs and laws, of the province." Here is seen a plain recognition of existing customs, at that period; and in relation to which the Common Law is made to give place. The customs alluded to, are not specifically defined, and local usages may be embraced within the generality of the expression used in the act. The object of the defendant, in this action, was to introduce evidence of a particular custom; and authority is not wanting to show, that it is the province of the Jury to decide thereon. (*See Doctor & Student*, c. 7, 10. *1 Inst.* 110.) How far the defendant might or might not have been able to establish, by proof, such a custom, it is impossible to say, as the evidence was rejected. Now, although, at the first blush, the custom alleged may appear unreasonable, and such as ought not to prevail, this is by no means conclusive, that the usage was not a good one in law. In such cases, recourse is had to artificial and legal reason; and thus considered, such usage may be shown to be beneficial to the boat-owners themselves, and dictated by the soundest policy of expediency. It is possible, the defendant may find it a difficult undertaking to defeat the claim of the plaintiff, by any proofs, which he shall be able to produce, in confirmation of the custom relied on; but no judgment can or ought to be formed till the proofs are brought forward. I am not prepared to say, that, in undertakings of this kind, the general law may not become altered by the

understanding of the contracting parties, although such understanding places them upon a different footing from that which exists at the Common Law.

It is competent, for a man or a body of men to renounce a Common Law right, if they think proper; and if, in relation to the river trade, either, from views of interest, on the part of the boat owners, or other politic considerations, expediency has pointed out the propriety, and usage has sanctioned it, then it might become the law by which the contract should be expounded; nor can I see how it would, in any manner, infringe upon the principles of the Common Law. It cannot be denied, but that by an express agreement, the consignor may be absolved from all responsibility; and established usage and custom, bottomed upon expediency, and the convenience and interest of the parties, may have the same effect.

I am of opinion, that the defendant should have been permitted to have gone into evidence of the custom, that it was the province of the Jury to decide thereon; and that a new trial should be granted.

Justices *Colcock* and *Nott*, concurred.

Mr. Justice *Johnson* dissenting, delivered the following opinion :

I take it to be a settled rule of the Common Law, (in the absence of any express contract) that a carrier, shipper or owner has a lien on the goods, or an action against the consignor for freight, distinctly recognized and acted upon, not only in this state, but in almost every other commercial country, so much so, that it would be idle to attempt, at this day, to adduce authorities to support it. But it is alleged that the particular custom, set up in this case, and offered to be proved, forms an exception to this general rule, and that the proof ought to have been suffered to go to the Jury. Put the proof offered in what shape you will, and give it the greatest possible extent you please, and it will amount to no more than this, that it is the usage in

Charleston for the factor to pay the freight of produce consigned to him. This usage either is or is not consistent with the Common Law rule. If the former, it does not abrogate the Common Law, and may exist with it, and only proves that the shipper, owner or carrier has by this custom a remedy against the factor for freight, which was not given to him by the Common Law, and the evidence was therefore inadmissible; if the latter, then I say that it is inadmissible, because our books of authority teem with cases in which the ship owner or carrier has recovered against the consignor the freight of his produce. I venture to assert, that upon examination of the proceedings of the several Courts in this state, hundreds of cases will be found in which plaintiffs have recovered on this cause of action, and under the same circumstances. One, the title of which has escaped my recollection, was tried by myself at Camden, about a year since, and not a word had before been heard of this custom. But it is further said, that this was a question for the Jury, and therefore the evidence ought to have gone to them. I admit that the existence or non-existence of a particular custom is a question exclusively for the consideration of a Jury, but its legality is a question of law which belongs to the Court to decide. It belongs to the Court to decide, because the Court alone are presumed to know the law, and when the question is once determined, that the custom set up is either consistent with, or contrary to, the known and established rules of law, to suffer such evidence to go to the Jury, would be at once to break down all distinction between the powers of the Court and Jury, and produce consequences, the tendency of which are not easily foreseen. I regret that time has not permitted me to enter into this case so fully as I wished and intended. It appears to me, however, to depend upon principles that cannot be misunderstood, and which, from the best consideration I have been able to give them, lead me to the conclusion that the opinion which I entertained on the trial, in the

Court below, was correct, and that the evidence was properly rejected.

Mr. Justice Bay concurred with Mr. Justice Johnson.

Parker, for the motion.

Pringle & Ford, contra.



THE STATE vs. JOHN EDWARDS.

The witness, and not the court, has the right to judge of the tendency of a question put to him, whether it will criminate him or not.

The Court will always so instruct a witness, as to enable him, if he possess any understanding, to determine whether he may be jeopardized by his answer; and, if the answer may form one link, in a chain of testimony, against him, he is not bound to answer.

When a criminal case is put to the Jury, it cannot be withdrawn, except by the consent of the accused, or by some unavoidable accident, to one of the Jury or the Court.

THIS case was tried before Mr. Justice Nott, at Charleston, January Term, 1819. Defendant was indicted for sending a challenge, accepting a challenge, and fighting a duel.

On the trial, three witnesses were called up and the question was successively put to them, by the Attorney General; "Have you at any time heard the defendant acknowledge or admit, that he had sent a challenge to the late Mr. Dennis O'Driscoll, or accepted one from him, or fought a duel with him?" The witnesses objected to answering this question, on the ground, that the answer would tend to criminate themselves. It was contended, on the part of the State, that the answer to this question could, in no way, criminate the witnesses, and that it would be time enough when such a question should be put, for them to object; and that the court and not the witnesses, must judge of the tendency of the question. It was also urged, that if the witnesses were thus permitted to shield themselves from giving testimony, the law against

duelling would obviously become a nullity. The Presiding Judge sanctioned the refusal of the witnesses, to answer, and rested satisfied with the opinion of the witnesses themselves, as to the tendency of the question.—The witnesses being thus excluded, the defendant was acquitted.

A new trial was moved for, by the State, on the following grounds :

1st.—Because his Honor, the Presiding Judge, mistook the law, in refusing to compel the witnesses to answer the question put by the State,

2d.—Because the answer to the question could not criminate the witnesses, and of this the Court (and not the witnesses) was to judge.

3d.—Because the operation of the decision must not only destroy the Duelling Law, but will protect all reluctant witnesses in every criminal case.

Mr. Justice *Colcock* delivered the opinion of the Court.

I presume, no rule, on the subject of evidence, is better established than that a witness shall not be bound to criminate himself. The only difficulty arises in the application of the rule. It must be admitted, that, if the question has a tendency to criminate the witness, according to the rule, he is not bound to answer. But, it is said, the court should decide this point, as to some questions. It is utterly impossible, that the court can decide without possessing a full and complete knowledge of all the facts which it may be important for the witness to conceal; therefore something must necessarily be left to the witness; and we have the same security for a knowledge of the fact, that he may be implicated by the answer, that we have for the knowledge of any other fact.

It was urged, that an ignorant man might not be able to decide. The court will always so instruct a witness as to enable him, if he possess any understanding, to determine whether he may be jeopardized by the answer; and if the answer may form one link, in a chain of testimony

against him, he is not bound to answer. (*Phillipps on Evid. Dunlap's Ed.* 206. 2 *Espinasse Dig.* 405. 16 *Vesey, Junr.* 242. *M'Nally*, 257. *King vs. L. G. Gordon*, 2 *Dougllass* 593. *Honeywood vs. Selwin*, 3 *Atkins*, 276. *Cates vs. Hardacre*, 3 *Taunton*, 424.) Under the act against duelling, all who counsel one to fight, as well as the seconds who are engaged, are made liable to the penalties. If the witness stood in either of these relations, he might be implicated by answering the question. It is not necessary that the privity of the witness should at once appear by the answer; nor will it be contended, that, that would have been the case here; but it may have formed a link in a chain of testimony extracted from him, or obtained from other sources, which may have tended to criminate him. It was contended, that, on a cross examination, the witness may have refused to answer any question which had a tendency to criminate him; but that this question did not tend to criminate him. This appeared to admit the whole argument of the counsel for defendant; for both the court and the witness thought it might, when connected with other matters, produce the consequence. But supposing the answer had not such tendency, and that the state had closed there, the defendant, upon his cross examination, would naturally have asked at what time and place, and under what circumstances was the confession made. I presume it will be admitted, that an answer to this might have implicated the witness—then he was permitted to refuse to answer—that would be the result. Could it be expected that the defendant would be convicted on the garbled testimony of a witness, and that too of so high a misdemeanor? I presume not. If then there be any doubt as to the tendency of the question, I think it is obvious, another would have removed the doubt; and therefore, that the Presiding Judge decided correctly, that the witness should not be compelled to answer the question. Although we may regret, that the act is defective, yet we have no power to legislate on the subject. It must be referred to the proper tribunal. I do not conceive

that the doctrine is calculated (as was contended) to protect reluctant witnesses generally. For it is clear, that if a witness swear he may be implicated in the guilt of the accused if he answer, and this afterwards appear to be false, he would be liable to an indictment for perjury. It is admitted, that it might be difficult of proof; but if that were to be an objection, much testimony, which is daily received, might be excluded. Suppose a witness called to prove the acknowledgments of a defendant, which was to operate against him, should swear, that it was made to him when alone, or to him in the presence of a person at that time dead, and this should be false. How, I ask, could he be convicted of perjury? It was necessary, that an opinion should be expressed on this point, as it may render some alteration in the act necessary. But on the question, whether such an appeal can be sustained, I entertain no doubt. I think, I may venture to say, that no case can be found where a new trial has been granted after acquittal, unless where it has been effected by the fraud or artifice of the accused. In the case of the *King vs. Mawley*, and three others, (from 6 *Term Rep.* p. 620 to 640,) two were convicted, and two acquitted: The court were clearly of opinion, and so ordered, that a new trial should be granted, as to those who had been found guilty. The difficulty was, how they should be separated, on the second trial. Two modes were suggested. One was, to alter the venue; the other to make an entry on the record, that two had been improperly convicted, and then to award a new trial, as to them. Lord *Kenyon* says, (*Ib.* 640,) "I do not know, that the first mode is objectionable. The second mode suggested has already been adopted: It was so in *Rex vs. Robbins*." and of course, I conclude it was adopted by them. I confess, that, at first, it did strike me, that perhaps, a distinction might be made when the testimony, relied on by the state, had been unexpectedly excluded. But I am satisfied, that all cases, however determined, must stand on the same footing in this respect.

When a criminal case is put to a Jury, it cannot be withdrawn, except by the consent of the accused, or by some unavoidable accident to one of the Jury or the court. The state therefore is bound to be ready when the case is put to the Jury.

I am against the motion on all the grounds.

Justices *Gantt* and *Johnson*, concurred.

Hayne, Attorney-General, for the motion.

Drayton, contra.



WILLIAM M'KEWN *ads.* MARY BARKSDALE.

A memorandum book, kept by the master-workman of mechanics, written some in ink and some with a pencil, is not admissible, with his (defendant's) oath to prove the loss of days work by plaintiff's slave, who was hired to the defendant; though that might have been the customary way of keeping such account.—(a.)

THIS was an action, commenced in the City Court of Charleston, for the wages of a black bricklayer, the property of Mrs. Barksdale, and employed by the defendant. At the trial, the defendant produced a small memorandum book, which contained an account of the days work of all the hands employed, and, among the rest, of the slave of Mrs. Barksdale. It also stated the lost time of each slave or hand hired by the day, as was the slave in question. And it noted the days when, from circumstances, he was not employed. Thus, "lost half a day," or "quarter," &c. giving the date. It was proved by a multitude of mechanics, that when slaves were hired by the day, they received larger wages than by the month; as \$ 1 per day, and about \$ 16 per month. But, that, for this extra compensation, they must actually labour during working hours: And if the weather was inclement, or if, from any cause, time was lost, it was deducted: In short, that it was a contract for so many hours labour.

This *memorandum* was sometimes in pencil and sometimes in ink; and in the hand writing of the master workman; and was the universal mode of proving lost time.

The defendant contended, that he had a right to prove by this book, together with his own suppletory oath, that a considerable sum ought to be deducted for time lost, during the period the bricklayer was employed, to wit: thirty-six days at \$1 *per day*. But this evidence was rejected by the court, as incompetent to establish the fact, that the negro had lost the several portions of days, making up, in the whole, that sum. And the jury, accordingly, found a verdict for the plaintiff, without any deduction for lost time.

His Honor, Mr. Justice Nott, supported the charge of the *Recorder*, from which an appeal was made, upon the grounds:

1st.—Because the deductions for portions of days, where the mechanic is employed by the day, is reasonable and just.

2d.—Because the mode of ascertaining the amount of time lost (which was proved to be the universal practice among mechanics) by a *memorandum* book, such as the one offered in evidence, is the only practical one that can be devised, and is the best evidence of which the nature of the case admits.

3d.—Because such a *memorandum* book, when the entries are confirmed by the oath of the party making them, is within the provision of the Act of Assembly, made for the purpose of permitting books of merchants and mechanics to be given in evidence.

Mr. Justice Nott delivered the opinion of the Court.

The books of merchants, shop keepers, handicraftsmen, &c. are received in evidence in our courts, from necessity, to prove the delivery of articles or work done; but even that is opening a considerable door to fraud and perjury. And to admit the evidence offered in this case, would seem like introducing a general rule; that a party

might, in all cases, be a witness in his own cause. If a day labourer does not do his duty, the employer may discharge him. If he is a slave, he may apply to the master to remedy the evil, or discharge him, as circumstances may require. But the mischief would be incalculable, were the practice, now contended for, to be indulged. A master, who supposed, he was receiving daily wages for a slave, might, at the end of a month, or any other given period, meet a discount to the amount of half his services.

The motion must be refused.

Justices *Colcock, Gantt, Johnson, and Richardson*, concurred.

Hunt, for the motion.

(a.)—See *Lynch* ad. *Petrie*, 1. *Nott & M'Cord's Rep.* 130. *Britchard* vs. *M'Owen*, *Id.* 131; in note. *Thomas* vs. *Admr. Best*, *Id.* 186. *M'Coul* vs. *Lekamp*, 2 *Wheat. Rep.* 117; and a note by *Mr. Wheaton*, as to admitting books in evidence generally. R.

JOHN COOK vs. THEODORE GOURDIN.

A Ferryman is liable as a common carrier; (a.) and it seems the law gives him the right of judging, when it is safe and proper for him to cross or not.

THIS was a special action on the case against the defendant, as a common carrier.

Mr. Gourdin was the owner of a ferry on Santee river, commonly called, and known by the name of, Murray's Ferry. And Cook, the plaintiff in this action, was a citizen of North Carolina, who lost two waggon horses by the unskilful management of the boatmen, who had the charge or direction of the boat or flat, in which, the plaintiff, with his waggon and horses, was crossing the river. It was therefore for the value of these two horses, that the present action was brought.

It was stated in the brief, and not denied, that the wind was high and the current of the river strong, when the

boat was passing. It further appeared, in evidence, that just as the flat was entering the strength of the current, the man who steered the flat, instead of keeping the head to the current, negligently turned it down; and that the man, who had the care and management of the same, instead of exerting himself, in order to bring the head of the flat up, to stem the current again, left his pole and went to the stern of the flat, to chastise the helmsman; and did beat him for his inattention and carelessness. In the mean time, the current took the broadside of the flat and swept her down three quarters of a mile; and, when the current took the broadside of the flat, the hands threw down their oars and poles, and refused to make any further exertions. By means whereof the flat was swept down the current near a mile, and being brought up against some trees on the opposite shore, they caused three of the plaintiff's waggon horses to be thrown over board; and two of them were drowned.

The defendant, on his part, called several witnesses to prove, that the ferry was as well kept and as well attended as any ferry on Santee; and that he had provided as good and skilful boatmen as any on the river.

Whereupon it was contended, that this was one of those unforeseen accidents for which the defendant ought not, in law, to be responsible.

The Presiding Judge, (*Cheves*) in charging the Jury, told them, that a *ferryman* was, in law, considered as a *common carrier*, and liable for all contingencies, except by the act of God, or the enemies of the state. The latter was not pretended in this case. He therefore said he considered the defendant liable, and that the plaintiff was entitled to a verdict.

But the Jury thought otherwise, and found a verdict for the defendant. The present was therefore a motion for a new trial:

1st.—On the ground, that a ferryman was liable, as a common carrier, at all events, except as laid down by the

Judge; and moreover, that he had various exemptions which other common carriers had not.

2d.—That he contracts with all the world to convey in safety all the articles committed to his care.

3d.—That the verdict was contrary to law, and the charge of the Judge; in as much, as there was none of the causes of exemption, in this case, which will excuse him, and that due care and diligence were not used.

Mr. Justice Bay delivered the opinion of the Court.

The two first grounds may be considered together, as they are very nearly allied to each other. And, as to them, I am clearly of opinion, with the Presiding Judge, who tried the cause, that every ferryman should be considered, in law, as a common carrier, and liable at all events, for the safe carriage of goods and passengers; except in cases occasioned by the act of God or public enemies, which cannot be pretended in this case.

A common carrier is defined, in law, to be one who carries goods for hire; and he is made liable for them in consequence of this hire or reward. (*Jones on Bailment* 16.) But a ferryman has another quality attached to his character. He is a man of high public trust and confidence; and the lives of passengers, as well as goods, are entrusted to his good conduct and management; and therefore he is at all times to be ready to transport both in safety, and with all convenient despatch, across all water courses where ferries are established by law. He exercises a high public trust, and therefore has many immunities attached to him. He is exempted from militia duty, even in time of war. He cannot be compelled to serve on juries, or to work on the high roads in the country. These exemptions, in addition to his hire, impose a high obligation on him, at all times, to be in readiness at the call of travellers, and to have all his boats and hands in good and proper order, for the conducting of goods and passengers across the river or water course over which his ferry is established.

From the foregoing principles then, I take it to be well established, by law, that a ferryman is liable as a common carrier.

Let us next see if there were any circumstances in this case to excuse him?

It is said, and admitted, that the wind was high and the current rapid. To each of these allegations, in justification of defendant, an easy answer is to be given:

First—If the general bent of the weather, or state of the atmosphere, be stormy, or tempestuous, the ferryman is perfectly excusable for not venturing over, if he apprehend danger; and has a right to postpone any attempt to cross till the storm or danger be over.

Second—If there be freshes in the river, which render it highly dangerous or impracticable for him to cross, he may in like manner refuse to go, till the water fall, and danger subside. *In fact, the law gives him the right of judging when it is safe and proper for him to cross, or not.* And if he will venture out, at an improper season, he is most unquestionably liable. But if a sudden gust of wind, or storm, arise, and an injury be sustained, after he is under way, then it is clear, the law will not charge him; because man cannot foresee sudden storms and tempests, and guard against them. But if he venture at perilous times, then he shall become chargeable.

The next inquiry is, whether due diligence was used by the ferrymen, after they had got into the river, or not?

From the best view I have been able to take of the case, there was not; for it appears, that when the force of the current came against the boat, instead of keeping her head to the current, which might easily have been done, the helmsman, or the man who steered the boat, turned her head down: And although the patroon of the boat chastised him for his inattention, yet the whole of the hands laid down their oars and poles, and left the flat or boat at the mercy of the current, until she had drifted down the river near a mile, where the horses were lost: It appears to me, therefore, that there was great want

of diligence on the part of the boatmen, on this occasion ; and that it was principally owing to that circumstance, that the accident or loss of the horses happened.

Upon the whole of this case, therefore, in whatever point of view it can be considered, I am clearly of opinion, that the verdict of the Jury was wrong, and that there should be a new trial.

Justices *Colcock* and *Gantt* concurred.

Mr. Justice *Nott* dissented as follows :

I am not dissatisfied with the event of the motion in this case. After the case of *Rutherford* and *M'Gowen*, taken in connection with the opinion of our late brother *Cheves*, who, it appears, concurred in opinion with those of the court in that case, who looked upon a ferryman as a common carrier, we ought perhaps to consider the question as settled: For although a majority of the court there did not consider a ferryman in that character, yet they put his liability on a ground equally imperative. And if he must be liable, at all events, it is immaterial upon what principle that liability is fixed, the result is the same to him. Nevertheless, as the question has still been considered open for discussion, I will, in a few words give the reasons on which I have, in both instances, differed in opinion from some of my brethren.

The general rule of law, with regard to bailees, is, that they are not liable for losses, except where they have been guilty of some neglect. With regard to common carriers, the rule is different. They are held liable, at all events ; except for losses occasioned by the act of God or a public enemy. No force, however great, no accident, however inevitable, no fraud, however beyond their control, will excuse them. But it is not pretended, that this is a rule of justice. It is a rigid, inflexible, rule of general policy or necessity, founded on the supposed facility with which carriers may combine with robbers or other dishonest persons to defraud their employers who have not the means of detecting them. (*Jones on Bailment*, 104-5.

1 D. & E. 27. *Forward vs. Pittard*.) But the principle does not apply to ferrymen. The owner of the property is usually present, which precludes all danger of fraud. It is not alone from any assistance which it is supposed he may derive from the owner's presence, or from any control that the owner may exercise over the property, but from the impossibility of his depriving him of it by any fraudulent means, that the ferryman is exempt from liability. The reason of the rule, therefore, ceasing to exist, the rule itself ought not to be applied. And such have been the decisions of our courts in other cases of carriers. Boats injured by hidden snags in our rivers, against which no human foresight could guard, have been made an exception. The nature of the undertaking of a ferryman should, it would seem, entitle him to the same exceptions in cases obviously beyond his control. He is obliged to transport droves of horses, cattle, hogs, &c. Shall he be liable, if one leaps overboard and is drowned, or injures another by kicking or otherwise? I can see no rule of justice or policy that requires it. Yet that will be the consequence of placing him upon the footing of a common carrier. I am therefore constrained to differ in opinion from a majority of the court, on that point.

I think, however, *there was pretty strong evidence of neglect, and am satisfied, that a new trial should be granted, on that ground.*

Mr. Justice *Johnson* concurred with Mr. Justice *Nott*.

Dunkin, for the motion.

Hayne, Attorney-General, contra.

(a.)—*Vide Rutherford vs. M'Gowen*, 1 Nott & M'Cord 17. R.

MARY MARSHALL vs. CHARLES & THOMAS DRAYTON,
and others.

A person cannot be made a party to a suit, except by process, or by consent; the only evidence of which must appear from the records. And defendants' names, only appearing in the judgment, is not sufficient evidence.

THIS case came before the Circuit Court, on a rule to show cause why a writ of *Fi. Fa.* issued in this case, should not be set aside, as to the defendants, *Charles* and *Thomas Drayton*, their names having, as was alleged, been illegally inserted therein.

The circumstances, which gave rise to the motion, were these: The plaintiff had sued out a writ of replevin against *Montague Jackson* and — *Levy*, the other defendants, and thereupon declared against all of the present defendants. To this declaration the defendants, *Jackson* and *Levy*, avowed for rent due to *Charles* and *Thomas Drayton*. And, in the plaintiff's replication to this avowry, they were also named as defendants; but the *similiter* to the replication, which concluded to the county, was in the names of *Jackson* and *Levy* only; and the names of *Charles* and *Thomas Drayton*, both in the declaration and the replication, were interlined; but at what time, or by what authority, did not appear. It was however conceded, on all hands, that *Charles* and *Thomas Drayton* were the persons interested to defend the action, and that no improper motive could be imputed to this circumstance.— Another singular circumstance was, that, on the first trial of the cause, in the Circuit Court, the defendants had a verdict, and in the judgment, entered up on that verdict, *Charles* and *Thomas Drayton* were named as defendants. But a new trial was granted, and on the second trial, the plaintiffs had a verdict, on which the present *Fi. Fa.* was founded.

The Judge, who presided in the court below, granted the motion to set aside the execution, as to *Charles* and

Thomas Drayton; and from that decision an appeal was brought up to this court.

Mr. Justice *Johnson* delivered the opinion of the Court. No person can be made a defendant in a cause, *except by the process of law or by his own consent*. It is equally true, that no one can be directly affected by the judgment of the court, except those who are parties. In this case, it does not appear, nor indeed is it pretended, that *Charles and Thomas Drayton* were made parties to the action, by any process of law; and it is only necessary to examine, whether the circumstances furnish legal evidence of their assent to become parties. The assent of a defendant to become a party is inferred from his entering an appearance or pleading to an action, although the process, with which he has been served, be irregular, and although, indeed, no process be served on him. But, it is apprehended, that there is no case in which it will be inferred from a mere verbal assent, even if such assent were fully proved. It results, therefore, that it must be by matter of record.

In this case, the names of *Charles and Thomas Drayton* do not appear on the record, in any stage of the proceedings, when they could possibly have been the actors, until the entering up of the judgment. On the first verdict, it is true, that they are named in the declaration and the replication; but these are, and must be considered, as the acts of the plaintiff. But in the avowry, and the rejoinder, (in form of a *similiter*) the only stages in the proceedings, in which they could have been the actors, their names do not appear. There is then no other matter of record from whence their assent can be inferred, but the judgment entered up in their names, on the first verdict. And there is no evidence, that this was done by their authority; and if there was, it was irregular, because the verdict on which it was founded, was only between the parties to the suit, and did not therefore authorize it.— But suppose the verdict had been beneficial to the

defendants, (as was the fact in this case, although to an inconsiderable extent, and doubtless irregularly so) could *Charles and Thomas Drayton* have reaped the fruits of it? I apprehend not. No act of theirs could have entitled them to it; and as strangers to the record, the law gave them no right.

Upon the whole, this case presents one of those tissues of blunders, from beginning to end, which ought always to be avoided in judicial proceedings, and which, to the credit of the profession, in this state, is rarely exhibited. It is said, however, that great injury will result to the plaintiff, if this motion be refused. But if the other defendants are able to pay the damages recovered, she has her remedy still against them, on the judgment; and if they are not, it was her own fault not to have proceeded against the Draytons, in the first instance, if, in truth, the distress was made by their authority.

The motion must be dismissed.

Justices *Bay, Nott, and Colcock*, concurred.

J. B. White, for the motion.

Grimke, contra.



THE STATE vs. FRANCIS ANONE.

It is too late in the Appeal Court to object to the commission of the Judge; it ought to have been done at the trial.—(a.)

It is immaterial whether the property sold by a slave, contrary to the Act of 1817, to prevent illicit trading with negro slaves, be the property of the slave, of his master, or of any other person.

The owner or master, sending a slave with goods, on purpose to entrap the person who might trade for them with the slave, and standing by, to see the act of trading, or otherwise to detect the illegal traffic, and not forbidding or sanctioning the transaction, does not thereby legalize such trading.—(b.)

Where defendant had been in the habit of trading with slaves, without a permit, and had authorized his clerks so to trade, and knew that his negro slave (whom he also kept as a clerk in his store) had traded in

the same manner, in his shop, to which he made no objection, it is sufficient evidence to presume, that he was so authorized by his master, as to make the latter liable for the penalty.—(c.)

TRIED before William Ellison, Esq. at Coosawhatchie, sitting for Mr. Justice *Grimke*.

This was an indictment against the defendant, for trading with a slave, without a ticket, under the act of December, 1817, which forbids all trading with slaves without permits or tickets.

It appeared, that the defendant was absent from his store at the time that the fact occurred; and that his slave, named Polydore, who had been long employed in the store, had received corn from a negro, without a ticket, and had given him some articles, out of the store, in return. The witness, who proved these facts, saw what had passed, having given the corn to the former slave and sent him to the store for the purpose of detecting defendant in trading illegally. This witness was the overseer of the master of the slave that carried the corn; and did not interfere or forbid the trade. Polydore had been in the habit of buying and selling for defendant, for a considerable time before; and there was proof, that he had before traded with slaves without tickets. It also appeared, that the defendant had, several different times, employed a white clerk. Defendant had said to the white clerk, that a ticket was of no consequence; but the clerk knew nothing of any express directions to Polydore, upon that subject. This clerk went away at the end of February, and the plan to entrap Polydore was executed in March of the same year.

For defendant, it was contended, that the evidence was not sufficient to warrant the Jury in finding the defendant guilty.

But the Judge charged, that there was sufficient evidence to justify the inference, that *Anone* had instructed Polydore to trade with negroes, without tickets.

The Jury found him guilty.

A new trial was therefore moved for, on the grounds : That the verdict was contrary to law and evidence ; in as much as there was no proof, of instructions to Polydore, to deal with negroes, without tickets ; and because a principal is not liable criminally, for the acts of his agent.

The appellant instructed his counsel to request the attention of the court to the commission of the gentleman who presided as Judge ; and that he might be allowed the benefit of this exception to the jurisdiction of the court, although the same was not taken at the trial.

There was another ground argued in this case, to wit, that, in as much as the corn was delivered to the slave, expressly for the purpose of detecting the defendant in trading with him, the corn became the property of the slave ; and the overseer standing by, and not forbidding it, the trading was sanctioned by him and became legitimate.

Mr. Justice *Richardson* delivered the opinion of the Court.

It is a plain misconstruction of the act of 1817, as well as of the acts upon the same subject preceding it, to suppose, that, to trade with a slave for his own property is not within the penalty of those acts. The evident object of it is to prevent any trading whatever with a slave. For this purpose, at least, a slave can have no property ; and it is believed, that the act of 1817, will embrace every instance of selling to, buying from, or bartering with a slave having no license. If frivolous charges should be made, they must be left to the cautious discretion of the prosecuting officer, the good sense of a Grand Jury, or finally to the Governor ; neither of whom, it may be safely concluded, will suffer a merely malicious charge, destitute of merit, to succeed. But the act in itself, from its full expression, the necessity arising out of our local situation and the consequent, obvious, policy, is comprehensive, universal and stern.

As to the other view which may be taken of this ground, that the overseer delivered the corn to the slave and stood by, not forbidding the trading; it has been long since decided, that the employer's delivery of any article to a slave, and afterwards standing by for the purpose of detecting an offender, who may trade with the slave, does not legalize the trading. On the contrary, this mean of detecting persons who notoriously trade with slaves, is becoming common; and being prudently practised, may be rendered very efficacious. It is true, that where the owner or employer stands by, apparently sanctioning the transaction, it is a fair inference, that the trading is with him and not with the slave; as frequently happens when a carriage stops at a store, and a servant is sent in for some article. But when the owner goes in order to detect, and, for that purpose merely, eyes the traffic carried on, giving to the offender no real or apparent intimation of his assent, it has been often decided, that the inference is rebutted by the truth; and the policy of the law sanctions a practice so essential to the exposure of skilful traders.

As to the request made, that the court would look into the authority of Mr. *Ellison*, for holding the court under a temporary commission, I will briefly observe, that, no such objection having been made at the trial, there is nothing regularly before this Appeal Court, upon that subject. Such a motion therefore comes too late, as was also decided in the case of ———. Any other decision might destroy the judgment, and other proceedings of entire terms, holden under such commissions. We cannot then strain liberality in order to indulge a request fraught with so much evil.

We come now to the only question properly arising out of the facts in the case, to wit: Was Polycore instructed by the defendant to deal with slaves without permits or tickets?

This was matter of inference from the evidence given; and involves the enquiry, perhaps, whether the Judge, in no way, mislead the Jury upon points made in his charge.

The law so well decided, both in this state and abroad, that a master is not liable for the acts of his servants, unless done by his authority; and that the principal, is not liable for the criminal acts of his mere civil agents, we fully recognize. (See *Middleton vs. Fowler*, 1 Salk. 282. *M'Manus vs. Cricket*, 1 East 106. 2 Roll. Abr. 553.) These positions are indeed well settled (in 2 Bay, 345, 360, *Snee vs. Trice*, *State vs. Dawson*.) But in the case before us, the sole enquiry is, was Polydore instructed? The Jury have affirmed that he was instructed to do the criminal act. But it is denied, that their verdict is supported by the evidence. To determine the truth we must turn to the testimony of the witnesses; and as the facts of the case are new (in the courts I mean) and may form an important precedent, dependent altogether upon testimony, I will narrate it somewhat more at large than is usual, and precisely as reported to this court.

Thomas Fulton, after proving the trading, swore, that Polydore was in the *constant habit* of trading with negroes, without tickets. And previous to this transaction, he cautioned defendant about the conduct of the negro, and advised him to put a white man there. When defendant replied *his lawyer told him his having a negro there would be sufficient*. He told defendant, that Polydore did trade with negroes, without tickets. He thought it was after that time, that defendant put a white man there. The witness gave the corn to the negro to sell, and followed him, and saw him sell the corn.

P. Hanson was clerk for Anone in 1817, and while he lived there, Polydore assisted him; and when he was absent, Polydore had the *principal management*. While witness was sick, Polydore had the *whole management*. Anone directed the witness to buy all the corn he could, and if the negroes brought 10,000 bushels to buy it. The witness remonstrated; to which defendant said he was not fit to do business. Polydore was there, and bought corn *without tickets*. The witness wrote several letters informing defendant, that the negroes brought so much

corn, that they must have stolen it. Anone came and told witness to buy all he could get, and made no mention of tickets. He could not pretend to say, that Anone told Polydore to buy from negroes without tickets.

Samuel Jones lived with Anone, as clerk, and came away the last of February, 1818. When this witness came away, he heard Anone tell Polydore to *take care of every thing, and to do as well as he could*, and all the money he got, to give it to Mrs. Quin. *Polydore was as much a clerk as witness was, acting under the witness.* Polydore was dealing there under Anone's directions, and bought of negroes without tickets; and defendant told witness to *buy* of negroes, and that it *made no difference about a ticket*. He never heard him give any directions to Polydore about a ticket. Defendant gave directions to this witness, and he gave directions to Polydore.

The Presiding Judge, charged the Jury, that if they believed the witnesses, the defendant's directions to Jones showed the principle upon which the defendant carried on trade at his store; and would be sufficient to raise a presumption that Polydore acted under defendant's orders of purchasing from negroes, without tickets; and if such should be their view of the case, from his testimony, in connection with the evidence of the other witnesses, they were bound to convict the defendant. He added that it would be difficult to produce positive proof of guilt under this law, when the agent of dishonesty was a negro, who could not be examined.

I conceive that this charge fairly left the inference to the proper tribunal, the Jury; and the observation subjoined, was in the true spirit and policy of the act. In my judgment, the moment it was established that defendant carried on a systematic trading with negro slaves, rational suspicion must arise; but add to this, that he instructed his clerks to deal to any amount with slaves, and these instructions given after the honest remonstrance of

Mr. Hanson, (in the face of too of his suggestions, that the corn, from the large quantities, must be stolen,) and suspicion becomes opinion. But does this testimony stop here? No. Polydore acting as his clerk was constantly, says Fulton, in the habit of trading with negroes without tickets. He informed defendant of Polydore's conduct, and cautioned him upon it. Yet the trade was still carried on; and (from the testimony) to an extent and with a continued disregard for friendly caution, faithful remonstrance and the laws of the country, as though he really apprehended that impunity was in proportion to the severity of legislative enactments, and that the sword placed over the head of offenders against these laws had so long mouldered in inactivity, as to have changed its temper and lost its edge.

To conclude, I believe I do no more than express the concurring opinion of the Court, in saying that the same force of direct and circumstantial evidence would warrant the conviction of a master, charged with assassination, through the agency of his slave. Even in such a case, to require direct proof of specific authority to the slave, would go well nigh, to legalize that worst of crimes. For in slave countries, whenever the crime of assassination prevails, it will be practised through the means of slaves, as is well attested by historical instances. If, then, to prove this high crime, so perpetrated, we can only look for circumstantial proof and implied instructions, well might Mr. *Ellison* observe, that whenever the agent of dishonesty is a slave, we must not look for positive proof of instructions. No, whenever a master makes his slave the minister of his crime, we can look for testimony only from his character and conduct, the object in view, the time, the place and attending circumstances. These sometimes forge the links and clasps of truth; develope, as in the very case before us, a vicious course, "unwhipt of justice," strike the offender through his covert conduct, and lay bare his hardihood to the bone.

The motion for a new trial, is unanimously dismissed. Justices *Colcock, Nott, Johnson, Gantt* and *Bay* concurred.

Grimke, for the motion.

Pettigru, Solicitor, contra.

(a.)—*Vide* Wood's Civil Law, 334.

(b.)—THE STATE vs. STROUP.

THE defendant had been convicted of trading with a negro under the Act of Assembly, 1796. (2 Brev. 248-9.) His counsel now moved for a new trial, on the ground, that the negro had been sent by his master to trade with him; it was therefore with the owner's consent, and not against the act, &c.

Sed Per Cur. the defendant did not know, that the owner had sent him, and the act makes it an offence to trade with a negro without a note or ticket in writing.

Motion discharged. M. S. S. Mr. Justice *Nott*, Columbia, Nov. 1805.

(c.)—THE STATE vs. BORMAN.

In this case, it was determined, that, on an indictment for retailing spirituous liquors, without a license, it must be proved, that the defendant sold the liquor in person, or authorized the sale of it.

Query? *Is a single act of vending sufficient proof of retailing spirituous liquors, without a license?*

THIS was an indictment, tried at the City Court of Charleston, May Term, 1819.

In this case there was an indictment against the defendant for retailing spirituous liquor, without a license, contrary to the Act of Assembly. On the part of the State, it was proved, that the witness purchased a gill of gin for a negro, of a person, who appeared as clerk, in a shop, over the door of which, there was not a sign, with the defendant's name on it. The witness also proved, that no other person was present, besides himself, the clerk and the negro; and also, that the shop was a store for the sale of fish, beef and other articles, besides liquors. Here the evidence, on the part of the state, closed.

On the part of the defendant, it was proved by a physician, that the defendant was sick in February, at the time the liquor was bought; confined to his bed, and incapable of attending to his shop. In his defence, the defendant contended, that he could not be convicted, because, by the indictment, he was charged with a crime; and that it ought to be proved, that he, in person, sold the liquor or authorized the sale; whereas it was proved, that the liquor was sold by another.

person, and in his absence, and when he was incapable of attending to business. He also contended, that he could not be convicted, because the indictment charged, that he had not a license, and no proof was offered on the part of the State, to show that he had not a license.

The Jury found a verdict of guilty.

From this decision, the defendant appealed, and moved for a new trial, on the grounds:

1st.—That it ought to have been proved, that the defendant sold the liquor in person or authorized the sale of it.

2d.—That it ought to have been proved, that the defendant had not a license to retail liquor.

Mr. Justice *Richardson* delivered the opinion of the Court.

That the principal is not liable criminally, for the acts of his agent, is a well settled rule of law. In *Fowler vs. Williams*, (*Salk* 282,) this position is laid down, "That no master is chargeable with the acts of his servants, but when he acts in the execution of the authority given him." In the well considered case of *Maner vs. Cricket*, (*1 East* 106,) in which the former cases were ably reviewed, the court came to this conclusion, that a master is not liable for the wilful acts of his servant, done without his assent. In the cases of *Snee vs. Trice*, and of the *State vs. Dawson*, (*2 Bay*, 245 and 360,) this rule is fully recognized in Carolina. Any other rule would make a servant the dispenser of the fame and fortune of his master. And however demoralizing may be the tendency of the practice of habitual retailing, especially where there are slaves, yet all offenders have equally a claim and right to the rules of criminal law. All are presumed innocent till guilt appears from testimony expounded through those rules. Unless guilt be discernable through their medium, acquittal follows as a claim of right, not of grace.

But it must not be understood, that the rule laid down as primarily governing the decision in this case, requires positive proof. It is considered, that circumstantial evidence, for instance, the character, or system of doing business, or even the business generally done in the store, former practices or directions to other agents employed, these and the like, would be received, from which, to infer, that the master directed or assented to the criminal act. Of this, we have given an example this Term, in the case of the *State vs. Anone*. But the case before us presents simply a criminal act done by the clerk of the defendant in his store, during his absence, and when too, he was sick. The connection between these two in business does not imply a concert in crimes. The contract between principal and agent is understood to be for legitimate, not criminal objects. If one step aside from the straight path of their legitimate course, does it follow, that the other also has gone astray; and that both must be punished? This would be to presume guilt, instead of innocence. At the same time, it is evident, that wherever the criminal act sprang out of the manner of

doing business, as in the present instance, selling by retail and for the apparent advantage of the principal: when the business was selling generally for him, the impression, that he authorized the act, becomes strong. Still it is but suspicion; and bare suspicion, however strong its capacity, for directing, explaining, and enforcing, evidence, positive or circumstantial, yet it cannot, of itself, counterpoise the great principle, that presumes innocence. Still less can bare suspicion break the chain of well connected decisions which establish, that the principal is not necessarily answerable for the crimes of his agent.

Wherever suspicion arises against one person, merely from his general association with another who has offended, suspicion is rendered harmless by the fundamental rule I have noticed. Such suspicion has no more than a capacity for receiving and pointing the testimony. But without testimony, suspicion, however active and quicksighted, is without its essential weapon, and the object of suspicion stands aloof from reach.

Unless there be this distinction between general suspicion derived from an association innocent in itself, and the conclusions which such an association assists us in drawing from actual evidence, what husband can be safe from the crimes of his wife? What parent against those of his child, or master free from the wilfulness of his servant? The natural and civil relations between these parties may beget suspicion against the principal whenever a crime is committed by the inferior. Yet neither the act nor the association, unconnected with other facts, is the smallest proof against the former. If the suspicion arising from the mere relation of the parties, could make the act of one proof of the others guilt, these necessary connections in civil society must loose their ends and character; and the rule that one is not liable for the exclusive guilt of the other, would have no meaning. No, this plain principle is intelligible in all these relations, and guards the innocent from the influence of mere suspicion, arising from the others conduct. A man's seeing a woman commit a crime, cannot implicate him; but if he is her husband, the marital authority may explain that fact, and make his presence evidence of participation in her guilt. In the like manner, a man's standing by when a lad retails spirituous liquors, is not proof of a man's guilt; but if he is the lad's master, his presence may be made proof of his assent to the crime. Thus, then, the private economical relation of husband and wife, master and servant, &c. cannot, of itself be the least proof against the party absent, but may well be the mean of expounding his own conduct, rendering it intelligible and connecting him thereby with the act of the party present. But first, his conduct must be proven, or no conclusion against him can follow. If the husband or master, if the parent or principal invite or countenance the act, in any way, his own conduct is a direct fact; and when connected with his authority, which is an explanatory circumstance, may add to suspicion the proof necessary to conviction. But without some

act, word or gesture of the principal, what is there, but a general undefined imperfect notion of guilt, springing from no source but a habit of associating the principal with the acts of the agent, or the vague surmise that the inferior would not have thus acted without the countenance of his superior; or at most, that when, for the master's apparent interest, it is presumed from our general experience, that he assented. But is such reasoning conclusive; and is it derived from any proof? Or is it not more like that of the mistress for punishing her slave "*sic volo, sic jubeo*." This may serve for punishing a slave, but never for convicting a freeman of a crime. No, we cannot be mistaken in such leading principles of law; the difficulty is in the application, and it is a great difficulty. The rules of Criminal Law are distinct; always equal and comprehensive. They command obedience. Unless we discover guilt, through their medium, we can see no guilt punishable here. Unless, indeed, all evidence be strictly controlled by them, we are left at a too variable discretion: Left to form rules upon the emergency of the day and fitting to them the crimes of yesterday. We should then punish past crimes by laws which should restrain them only in future; and the too partial feelings of the particular occasion would become the narrow tyrant of the moment.

For my own part, I deem the case before us settled by the adjudications noticed. But as there is a difference of opinion, I have endeavoured to place it upon allowed principles also.

Some of my brethren question much whether a *single act of vending would be sufficient proof of retailing illegally*. But my aim has been to show the total absence of all proof indispensable to support a verdict against a principal charged with the act of his agent; and to let the case turn upon principle rather than upon the insufficiency of proof. My position being, that there was no proof from the want of some act of the defendant personally, in order to connect him with the criminal conduct of his clerk.

The other question made in the case is unnecessary to the decision; and some of us apprehending that it was formerly decided at Columbia in a case not yet published, I forbear to touch it. But upon the former ground, the motion for a new trial is granted.

Mr. Justice Johnson concurred.

Mr. Justice Nott concurred in this opinion, but not in all the reasons therein mentioned.

Mr. Justice Colcock, was absent when this case was tried.

Justices Gantt and Bay dissented.

Gadsden, for the motion.

Hayne, Attorney-General, contra.

R.

WILLIAM HASELL GIBBS, Master in Equity, vs. GEORGE
CHISOLM.

A bond with a condition, "that the lawful interest on the whole principal sum, shall be paid annually, together with one third part of the said principal sum, at the end of each year, until the whole be paid off," is not usurious. And the obligee is entitled to interest on the aggregate amount of principal and interest of each instalment, as it becomes due.

THIS was a rule on the Sheriff of Charleston district, to show cause, why he had not levied money and paid it into court, conformably to the exigency of the execution issued in this case.

This was understood to have been an amicable mode of obtaining a decision, upon a point of law, relative to the payment of interest money, agreeably to the contract of the parties; and it was brought up before this court by way of an appeal from the decision of Mr. Justice Johnson, in the Circuit Court.

The facts of the case, as stated in the brief, appeared to be the following, *to wit*: That the master in equity had sold an estate to Mr. Chisolm, for the sum of 24,750 dollars, on condition, that the *lawful interest, on the whole principal sum, should be paid annually, together with one third part of the said principal sum, at the end of each year, until the whole was paid off.* That in pursuance of these terms of the sale, the defendant, Mr. Chisolm, gave his bond, conditioned for the payment of the said principal sum, (\$ 24,750) *in three equal annual instalments, viz. one third of the principal, on or before 1st November, 1812; another third, on or before 1st November, 1813; and the remaining third part, on or before 1st November, 1814; with interest, on the whole principal sum, to be paid annually at the end of each year:* That these payments were not regularly made, agreeably to the terms of the condition of the bond; whereupon the bond was put in suit, and judgment obtained for the penalty, on the 12th February, 1816. After which, an execution

was issued, to the sheriff of Charleston district, and the amount of the condition, with simple interest thereon, was collected by the sheriff, *without adding or receiving legal interest, on that part of the interest which became due and payable, at the end of each year successively, which, it was contended, by the plaintiff, formed a new and distinct debt, at the end of each year it became due.*

The Presiding Judge, however, overruled the plaintiff's claim, and decided, that the payment of the principal sum mentioned in the condition, and the common interest thereon, (without any regard to the annual reservation of interest) on the whole of the principal due, as the instalments became payable, and that the rule upon the sheriff, which was issued, was prematurely discharged before the whole of the interest due was satisfied.

H. A. DeSaussure, in support of the plaintiff's motion, contended, that the defendant was bound by his contract, and that there was no principle of law against it: That the contract was not usurious; nor could it be considered as compound interest, in any wise contravening the law against usury. He argued, that the interest of the whole, formed a new, distinct, and substantive, debt, at the end of each year, as the different instalments became payable, by the terms of the original contract; and, for this purpose, he relied upon the following authorities, as in point, *Le Grange vs. Hamilton*, (4 Term Rep. 613,) where it was held, that an indorsement on a bond, that interest on the principal (if not paid) should be added to the principal, and the whole to bear interest at 5 per cent. was not deemed usurious. He next quoted *Ord on Usury*, 36, where on an action of debt on a judgment, it is laid down, that interest is allowable on the aggregate sum of debt, interest, and costs, due to the time of payment: Also, *Greenleaf vs. Kellogg*, (2 Mass. Rep. 568,) where a note was given, payable in eight years, with interest, payable annually, it was held, that an action would lie for the interest, before the principal became due, at the expiration of each year.

Mr. *Prioleau*, against the motion, urged, that the decision, on this occasion, was a just one, and ought to be supported by the Court of Appeals; as it went to guard against usury and compound interest. He admitted, that it might be the law in *Massachusetts*, but it was not law in this state. He relied on *Ossulton vs. Yarmouth*, (1 *Salk.* 449,) where it is said, an agreement to make interest principal is void; although, if the money be paid, it may be turned into principal. Likewise on 1 *Binney's Rep.* 165, (*Sparke vs. Garrigues*,) where it was determined, that interest was not allowed on a bond to make principal and interest carry interest: Also, (*Connecticut vs. Jackson*,) 1 *Johnson's Chan. Ca.* 14, where the same doctrine is laid down.

These were the principal grounds, and authorities quoted and relied on by the counsel on both sides of this question.

Mr. Justice *Bay* delivered his opinion as follows:

I have endeavoured to give the authorities and grounds in this case the best consideration my time would allow me, on the present occasion; and from the best view I have been able to take of the case, I am clearly of opinion, that there was *nothing illegal* in this contract, *originally*; and if not illegal in its origin, then I think it is binding on the parties.

Every man is free to contract, or let it alone; but if he thinks proper to enter into one, then the terms and conditions of it (unless immoral or illegal) become a law to him, and forms, what civilians call, the Law of the Contract. On the present occasion, Mr. *Chisolm* had an undoubted right to enter into any contract he thought proper, with the Master in Equity, for the purchase of the estate in question; and, on the other hand, the Master in Equity had an equal right to prescribe such terms and conditions as he thought proper, for the payment of the consideration money; therefore, the parties stood in the most perfect reciprocity towards each other.

The next inquiry, then, is, whether there is any thing illegal or immoral in the terms agreed upon by the parties?

The latter is not even insinuated, and as to the former, there was certainly no existing law against it. The law, to be sure, says, that if more than seven *per cent.* interest is reserved, for the use of money, it is usurious, and every such contract shall be void. But the law no where says, that a man may not make the legal interest payable in such manner and at such times as he may think fit and reasonable. This may be often necessary and proper for the support of families, and the convenience of women and children, where the principal sum is not immediately wanted. And is it for this Court to set bounds and limits, or to fix other terms and conditions, to contracts than those agreed upon by the parties themselves? It would be a most dangerous assumption of power, if they did, utterly unknown to the laws of the country.

Let us examine a little further and see what the nature of the contract, under consideration, was.

It was to pay the principal sum, mentioned in the condition of this bond, in three years, by three equal, annual instalments. There was surely nothing illegal in that part of the agreement. Next, an agreement to pay the whole of the interest, due on the principal sum, at the end of each year, as the instalments came round, and became payable. What interest? Not usurious interest, but the legal interest of the country. Can any man pretend to say that it was usurious to receive the legal interest at the rate of seven *per cent.* on the whole of the principal sum at the end of the year, when the first instalment became due? No one will be hardy enough to assert that it was, even if the contract had been silent on the subject. But there was an express agreement that the interest should be paid at the end of every year. It is evident, then, that the whole of the interest became due, at the end of each year, and raised, in law, an undertaking to pay the amount, as substantially, as if he had given a note or a bond, for a spe-

cific sum equal to the interest. And I think I am fully confirmed and warranted in this opinion, by the case from 2 *Massachusetts Rep.* 368, quoted by plaintiff's counsel, in the argument, where a note was given payable in eight years, with interest annually; in which it was held, that an action lay for the interest before the principal became due, at the expiration of each year. Now, I confess, I cannot see the difference between the *Massachusetts* case and the one under consideration, unless it be, that the one was upon a simple note of hand, and required an action to recover the interest, whereas, in this case, the whole was covered by the penalty of the bond, and the execution warranted the levy of the interest by the sheriff, without further suit.

The case quoted from Judge *Taylor's Reports*, 231, (*Kennon vs. Dickens*,) is equally as strong as the *Massachusetts* case. That, like the present, was a contract for the purchase of land, at, and for, the price of 1000*l.* Virginia currency, on a credit of fifteen years, for the principal sum; but the interest was to be paid annually, at the rate of six *per cent.* per annum, for which the defendant gave his bond, with security, in 2000*l.* In that case it was decided by the Court, that there could be no doubt, but that the instalments bore interest from the times they respectively became due; for, being principal debts, and secured by specialty, such a consequence follows of course, upon the failure of the payment of interest according to the agreement of the parties. The Court then goes on and says, that, as a general rule, interest upon interest is not allowable. But when the sum is ascertained, and the annual interest on it, forms a part of the contract, and when it is so specific, that an action of debt may be maintained upon it, then it ought in justice to be allowed, to supply the place of prompt payment, and indemnity to the creditor for his forbearance.

It would seem that the foregoing authorities, and the reason and justice of the thing itself, would not require any further illustration of the principle contended for by

the plaintiff. But as there is some diversity of opinion, on the subject, entertained by the bench, I have to observe, that in my opinion the English authorities, confirm the above legal principles of our sister states, as well as the decisions in our own state.

In the case quoted from *Ord on Usury*, 36, it is laid down, as decided law, that where a judgment is obtained, on a debt due by record, interest is allowable on the original debt, interest and costs. In this case, it is evident, interest is allowable on interest, where such interest has become due, and has been fixed and ascertained. For which I add, that in 1 *Black. Rep.* 267, it is also laid down as a rule, that judgments at law bear interest on the accumulated sum of debt, interest and costs: So in *Brown vs. Barkham*, (1 *P. Wms.* 653) Lord Parker says, a Master's Report, computing interest, makes that interest principal to carry interest; for a report is as a judgment of the Court, and the party's disobedience, in not complying with the time of payment, ought to subject him to payment of interest. So that both the Courts of Law and Equity, concur upon the point of interest carrying interest in all cases where judgments are entered up, or where a sum is reported due by a Master in Chancery.

In the case of *Gladman vs. Henchman*, (2 *Vern.* 135,) a mortgage was made for 450*l.* principal, payable at the end of five years, and in the mean time, interest to be paid half yearly. No interest being paid, about two months before the five years were expired, the mortgagee assigned to defendant in consideration of 560*l.* being then so much due for principal and interest. The question then before the Court, was, whether the interest then due, should carry interest. It was objected that "the mortgagee ought not to have assigned until the five years were quite expired; *Sed non allocatur*; for the mortgage was forfeited long before, by non-payment of the interest. And the Court decreed the 560*l.* to be paid, with interest from the time of the assignment." This was only carrying into effect the original agreement of the parties, and as the interest had not

been paid up half yearly, as stipulated, the Court allowed interest upon the interest, which should have been paid as an indemnification for the delay; and this is, in my opinion, exactly such a case as the one now under consideration.

In 1 *Eq. Ca. Ab.* 287, (*Chesterfield vs. Cromwell*) Lord Chancellor *Wright*, lays it down as a rule, that though, regularly, interest shall not carry interest, yet in some cases it would be singularly unjust, not to allow it; particularly when made for the benefit of infants, who, without this agreement, might be destitute of subsistence. In this latter case the party was held to his agreement to pay the interest as stipulated; and in default, was compelled to pay interest upon the interest, as it became due.

The cases in our own Courts, where interest has been allowed upon interest on judgments, are the case of *Lamkins vs. Nance*, determined at Columbia in April, 1806, and that of the *Assignees of Miller*, a bankrupt, against the *Executors of John Fabre*, determined at Charleston, in 1807. These were both actions on judgments, and the Court held, in both cases, that the plaintiffs were entitled to interest on the accumulated sum of the original debt, interest and costs, and I may add, that a great variety of other cases have been determined, upon similar principles, since.

As to the case quoted for defendant, by his counsel, Mr. Prioleau, from *Salk.* 449, where it is said, "that a proviso in a mortgage, to make interest principal, if it was behind and unpaid for six months, was vain and of no use; and that to make such an agreement valid, it is necessary, that the interest should grow due for it; and then an agreement concerning it may make it principal." With great respect to the memory of the learned sergeant, who reports that case, I cannot bring myself to assent to the reason, and the conclusion he draws from it, especially after the numerous and pointed authorities I have already quoted, in support of the present motion, most of which are later authorities than the one reported by sergeant *Salkeld*,

and consequently go to overrule the decision made in the above case. But the principal objection I have to it, is, that it goes to abridge and destroy one of the original rights of mankind, in the formation of contracts, and that free agency to which every man has a natural right, in making his own agreements.

In all those cases where the policy of the law forbids certain contracts, I admit, that every man is circumscribed; but in all other cases he is unrestrained. It is not alleged in the case, in *Salkeld*, that there was any thing illegal in it, or that it was prohibited by law; only that it was vain and of no use, because the interest had not become due; or in other words, that a man had not a right to contract or stipulate upon a contingency, which was to happen after the contract was made, and which was to spring out of the contract itself, as one of its certain and eventual consequences. I confess, I cannot see the force of this kind of reasoning, upon such a subject, and therefore cannot yield my assent to it. I am constrained to give the same answer to the cases quoted by the defendant's counsel from 1 *Binney* 175, and *Johnson's Chan. Ca.* 14. But even to give all those cases their utmost latitude, as contended for, they are not analogous to the case under consideration; for they were all cases to convert interest into principal, as it became due; whereas, in this case, it is an agreement to pay the legal interest to the plaintiff, on the principal sum, at the end of every year, for his convenience or subsistence, as he thought proper to appropriate it. There is therefore nothing illegal or unjust in the whole transaction, on the part of the plaintiff, and he appears to me to be as justly entitled to interest on the sum, which should have been paid him at the end of every year, for interest, as he was to any part of the principal sum mentioned in the condition of the bond, agreeably to the original intent and design of the parties when the contract was made and entered into.

I am therefore of opinion, that the rule should be made absolute, against the sheriff, unless he will go on and levy

the interest on the different payments, which were to have been made for interest money, at the end of each year, agreeably to the condition of the bond. But if he will raise and collect the same, and pay the amount over to the plaintiff or his attorney, that, then and in that case, the rule to be forthwith discharged.

Mr. Justice *Nott* delivered his opinion as follows:

I concur in the opinion which has been delivered by my brother *Bay* in this case; but, as it appears susceptible of so many different views, I beg leave to express my own opinion in my own way.

If there be nothing unlawful in such a contract, the court must enforce it; and it is not *unlawful* unless it be *usurious*. If it be *usurious*, the whole bond is void, and the plaintiff can recover nothing. In England, with all the strictness which has prevailed in their courts on the subject, such a bond has been held not to come within the statutes against usury. (4 *Term Rep.* 613. 2 *H. Blackstone* 144.) In *Massachusetts* and *North Carolina*, it has been decided, that such a contract is lawful, and that the payee is entitled to *interest on the interest*, so agreed to be paid. (2 *Mass. Rep.* 568. *Taylor's Rep.* 231.) To constitute usury, more than seven *per cent.* must be reserved for the annual use of money. In this case, nothing is required except simple interest on the money due, from the time it was to have been paid. A part of the money so due, to be sure, was interest, which became converted into principal; but there is nothing unlawful in that.

Let us only state the case in another form, and the whole mystery will disappear.

Suppose a person were to sell an estate worth 10,000 dollars, on a credit of ten years, and instead of reserving interest to be paid annually, on the face of the bond given for the purchase money, he should have it secured by ten several notes payable one, two, and three years, and so on, up to ten years, after date. Would not each note

carry interest from the time it became due ; and would it not be the same thing if it were expressly stipulated in the condition of a bond ? The annual interest of 10,000 dollars is 700 dollars ; and whether a person promise to pay 700 dollars, or the annual interest of 10,000 dollars, is only using different words to express the same idea ; for that is certain which can be rendered certain.

It is said there is no express promise in this case, that the interest shall be converted into principal, and that interest shall be paid upon it. But when a person promises to pay a specific sum, on a given day, the law implies a promise to pay interest from that day, if the principal is not paid : And he adds nothing, by an express promise, to an obligation which the law requires him to perform. There is nothing oppressive or unjust in such a contract.

Suppose a person, for the purpose of making convenient provision for a family, should sell all his estate on a long credit, with interest payable annually, for their support. Would they not be entitled, even in equity, to interest on each instalment, if the payment should be withheld ?

The case from 1 *Johnson's Chan. Ca.* 14, is a case of compound interest. Not so here. All that the party demands is simple interest, on the amount stipulated to be paid. The cases, read from the equity books, are either cases of compound interest, or of peculiar hardship, in which, that court felt authorized to grant relief ; but this court must proceed according to settled and uniform rules of law, and cannot accommodate their decisions to the circumstances of every particular case. If there be any thing in the case which will authorize the interposition of a Court of Equity, to that court let the party apply.

Mr. Justice *Colcock* concurred.

Mr. Justice *Johnson* dissented as follows :

Distrustful as I am of my own judgment, when it leads me to differ from the opinion of a majority of my breth-

ren; and willing, as I always am, to yield to that high authority on doubtful questions, I cannot persuade myself to give even a reluctant assent to the doctrine established in this case. I think it subversive of the morals and the interests of the community, and calculated to open a high road to the most abominable usury, and to break down the guards which the law has placed over the hard hearted usurer.

The policy and propriety of regulating interest on money by law, have been called in question, I am aware; but I am inclined to think, it may be vindicated. It is not however my intention, nor is it necessary, to discuss that question. It belongs to another department of the government; and it is sufficient for my purpose, that I find on our statute book, a law forbidding the reservation of more than 7 *per cent. per annum*, and in that proportion, for a greater or less period, for the loan of money, &c.

In considering this question, I shall, in the first instance, lay aside the consideration, that in this case there is no express stipulation that the annual interest should become principal, and carry interest; and consider it on the broad ground, that in whatever shape it may be put, it is subversive of the laws against usury.

Upon a rough calculation, which I have made, a sum put to interest on the principle, that the annual interest shall carry interest, will, in the short period of twenty years, produce an average amount, or annual interest, of about twenty-six *per cent.* But, if the contract should provide for the quarterly or monthly payments of the interest, an inconsiderable sum, would, in a short time, beggar arithmetical calculation. It were better to repeal the laws against usury, and to suffer the unfortunate borrower to rush into ruin at once, than to steal upon him by those almost imperceptible means; for although it may be said, that he enters into it with his eyes open, yet, we know that those who are pinioned by the hard hand of necessity, seldom make the necessary calculations as to consequences. It has been said, that our statute provides for the

annual interest only, and that any contract making the accruing interest payable at shorter periods, would have the effect of giving a greater annual interest, and therefore be void. But from the best consideration I am enabled to give it, I am at a loss to see the distinction. It is true, that a year is given to fix the rate and proportion of interest; but it is equally true, that the statute itself fixes that rate as the standard by which it is to be calculated, for a shorter or longer period; and if the doctrine contended for on the part of the motion, be established, I see no reason why the lender may not, by his contract, make the interest payable, and become principal *de die in diem*; and where this would end, I leave those whose interest may require it, to make the calculation. With regard to the particular case under consideration, I can see no difference between this contract and every other out of which interest would arise, except that it gave the plaintiff a right to sue on the non-payment of the interest.

In all cases, where interest is reserved, and the payment of the principal and interest is postponed until a given day, the interest as well as the principal will then carry interest: So, that although the sum borrowed carry only legal interest, up to the time to which the payment is postponed, yet, after that period, a greater interest is allowed. It is said, however, that where the contract is to pay the interest at stated periods, it is the right of the lender to demand it, and the duty of the borrower to pay it; and having it in his possession, he may again put it to interest. This is true. But I think the statute gives the answer to this argument. The lender is not permitted to demand more than *seven per cent. per annum*, and at that rate, for the principal sum borrowed. In questions of construction, some indulgence is due to the habits of the world, and to the indolence of mankind; for they are so deeply rooted, that we had as well attempt to reverse the laws of nature, as to alter them.

It has been further insisted, that the question is resolved into the inquiry, whether the contract is, or is not, void,

as being usurious? that, if it is not, we are bound to carry it into effect. That question might arise where the contract provides, that the interest should become principal, and carry interest; but in this case it is not doubted, that the contract itself is legal; but I think the doctrine contended for would give to the contract an usurious, and consequently an illegal effect. When the contract itself provides, that the interest shall carry interest, I am not prepared to say that the whole contract is void. On the contrary, I am inclined to think that it is good, as to the principal sum, and the legal interest, but void as to the provision, on account of its tendency to usury; and on account of its being predicated on a consideration which had no existence at the time; and which I think, I have shown, never could have had an existence. To which I will only add, that if it had for its basis, a view to an increased rate of interest, it is usury, and if it had not, there was no consideration. .

On the ground of authority, I might, I think, content myself with the able and masterly review which Chancellor *Kent* has taken of them, in the case of the *State of Connecticut vs. Jackson*, (1 *Jackson's Chan. Rep.* 13,) in which he comes to the conclusion, that interest upon interest ought not to be allowed, except in a few cases, which furnish exceptions to the general rule; within which, it is not pretended, that this case falls. His reasoning, as well as his conclusion, is so satisfactory, to my mind, that I cannot do better than to adopt them as my own. I cannot, however, forbear to add the authority of Lord Chancellor *Cowper*, in the case of *Lord Ossulston vs. Lord Yarmouth*, (1 *Salk.* 449.) He says, an agreement at the time of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it must first become due, and then an agreement concerning it may make it principal. (*Vide also, Exors. Lewis vs. Exors. Bacon*, 3 *Henning & Munford* 89, 116. *Sparks vs. Ganigues*, 1 *Binney*, 165.) It is said, however high this authority may be, it is the decision of a Court of Chancery, in which the rule may be different from that

which governs a Court of Law. It is true, that, in the case referred to, Chancellor *Kent* has left that question unsettled; and he says, that perhaps a Court of Law would not carry such a contract into effect. But on this subject, my mind is equally satisfied. The jurisdiction of the Court of Chancery, differs little from that of the Court of Law, except in the mode of obtaining evidence and administering relief. It is equally bound by the rules of law, in the construction of contracts, and has no more power to carry into effect a contract illegal in itself, and void of consideration, than this court. The case of *Le Grange vs. Hamilton*, (4 D. & E. 613,) cited on the part of the motion, establishes a position, that has not been denied. It is, that where payments have been made on a contract carrying interest, the interest shall be first deducted out of the payment, and the balance passed to the payment of the principal sum; and that a contract providing for it, is not usurious. It is not usurious, because it is the legal consequence of a contract to pay interest on money; but I would say, that it was an useless and unmeaning surplusage. All the direct authorities which have been adduced on the part of the motion, are *Greenleaf vs. Kellogg*, (2 Mass. Rep. 568,) & *Taylor N. C. Reports*, 231. To these are opposed the cases above cited, and the current of English decisions. Perhaps, too, these may have arisen out of the peculiar wording of their statutes against usury; or perhaps they may be found in the rage which has run the rounds of the United States, within the last few years, to loose entirely the shackles, which the laws against usury impose. As highly therefore as I respect these authorities, when thus supported, I cannot surrender my own opinion. This opinion has grown up with me from my infancy, and is taught as a lesson in schools; and I venture to say, that there is not a school boy, or a counting house clerk, who has learned to calculate interest, that will not tell you, that compound interest is not lawful; and this is surely one species, at least, of compound interest. Upon enquiry,

also, among merchants, and money brokers, it will be found, that such a principle of calculating interest, has never been recognized as lawful.

Mr. Justice *Gantt* concurred with Mr. Justice *Johnson*.

Rule made absolute.—(a.)

H. A. DeSaussure, for the motion.

Prioleau, contra.

(a.)—See *Howard vs. Harris*, 1 Vern. 194.

R.



JOHN M'KINNIE, ads. CREWS, LITTLE JOHN, et alios.

One of several co-devisees conveyed away, the land devised, to a third person. He cannot become a co-plaintiff, with the other devisees, in an action to try titles, against the purchaser to whom he sold, and thereby defeat the title of his own creation.—(a.)

THIS was an action to try titles to a tract of land, lying in the district of Colleton.

Mr. Justice *Colcock*, who presided on the trial of the case, at May term, 1818, suffered a verdict to go for the plaintiffs. The defendant M'Kinnie, appealed on the following ground:

That the Presiding Judge charged incorrectly, in having stated to the Jury, that Little John and wife, could be made plaintiffs in the action.

It appeared that the defendant, M'Kinnie, purchased the land in dispute, of Little John, one of the plaintiffs in the action. The land had been the property of — Crews, deceased, who by his last will and testament devised the same to his children. Little John, having intermarried with one of the devisees, by deed of bargain and sale, conveyed the tract of land, the subject matter of the present suit, to the defendant M'Kinnie, in fee. Whether he could be made a co-plaintiff with the remaining devisees, and aid in defeating the title thus made, was the question? The Presiding Judge under the special circumstances of the case, particularly as regards the limitation in the will of the devisor, thought that he might be made a

plaintiff; and under the sanction of his opinion, the verdict passed in favor of the plaintiffs.

Mr. Justice *Gantt*, delivered the opinion of the Court.

The law recognizes cases wherein a person will be estopped from alleging or speaking the truth; and where the act of the party does, *ipso facto*, interpose an impediment or bar to a right of action on his part; and that principle applies in the present case.

In a deed, all the parties are estopped to say any thing against what is contained in it. A lessee is estopped to say that the lessor had nothing in the land. (*Litt. 58, Co. Litt. 352.*) Lord *Coke* says, that if a feoffment be made to two, and their heirs, and the feoffor afterwards levies a fine to them and the heirs of one of them, this will be an estoppel to the other, to demand the fee simple according to the deed; for the fine shall enure as a release. (*6 Rep. 7, 44.*) So again, if tenant in tail suffers a recovery, that his issue may avoid, he himself shall be estopped and concluded by it, and may not demand the land against his own recovery. (*3 Rep. 3.*) So the taking of a lease by indenture, of a mans own land, whereof he is seized in fee, is an estoppel to claim the fee during the term. (*Moore's Ca. 323, and 121.*) In *Ca. Litt. 47*, it is said, if a lessor at the time of making the lease, hath nothing in the land, but after he gets it by purchase or descent, it is a good lease by estoppel. (See, also *Dyer, 256. Plowd. 344.*) From these quotations, I feel satisfied, that Little John, the alienor, could not legally join in an action to defeat the efficacy of the conveyance made by him. His deed operates by way of estoppel, so far as respects himself. He might be vouched, and made a co-defendant to aid in supporting the title which he had created; but in no case could he be called on or permitted by law to aid in defeating it. Whatever was his interest in the land, whenever to be enjoyed, whether *in presenti* or *futuro*, or whether any or not, he was equally estopped from becoming a plaintiff in this case.

As the doctrine of estoppel will equally apply to those who are parties or privies to verdicts in subsequent actions to be brought, it would follow, that if the present verdict should stand, then M'Kinnie, the defendant, could never meet with indemnity for any imposition or fraud practised upon him, in the sale and conveyance of this land, by Little John. It has been decided, that if a verdict be found on any fact or title, distinctly put in issue, in an action of trespass, such verdict may be pleaded by way of estoppel in another action, between the same parties, or their privies, in respect of the same fact or title. (*Outram vs. Morewood*, 3 *East's Rep.* 346.)

In the case at bar, I am of opinion, that a new trial should be granted, and this is the unanimous opinion of the Court.

Justices *Nott*, *Bay* and *Johnson* concurred.

Holmes, for the motion.

(a.) See *ante* Vol. 1, 339, *Kidd vs. Mitchell*.

R.



MATHEW O'DRISCOLL vs. HUGH M'BURNEY.

A memorial presented to a Grand Jury, complaining of the conduct of the plaintiff, who was a public officer, but not acted upon by the Grand Jury, is not such a prosecution, as will support malicious prosecution. There can be no prosecution without an arrest.

Nor is the refusal of the Grand Jury to act upon it, a sufficient termination of the case to support *mal. pros.* for application may be made to another jury.

THIS case was tried before Mr. Justice *Colcock*; at Colleton district, Spring Term, 1818.

This was an action for malicious prosecution. It appeared, that the defendant had presented to the Grand Jury a memorial, complaining of the conduct of the plaintiff, who was a public officer; that it had been received by the Grand Jury, but not acted upon, and by them returned to the plaintiff, as clerk of the court.

Upon this a nonsuit was granted.

A motion was now made to set aside the nonsuit, on the grounds, that this was a prosecution, and that it had been shown, that it was at an end.

Mr. Justice *Colcock* delivered the opinion of the Court.

The case does not admit of the least doubt. This was not a prosecution. There can be no prosecution without an arrest. It is indispensably necessary to support this action, that malice, (and that the arrest was without probable cause) be alleged and proved. (*2 Selwyn's N. P. 1057.*) If a man make an affidavit charging the commission of an offence or crime, but never takes out a warrant, although he may subject himself to an action, he will not be liable to this action. But if, by any possibility it could be considered as a prosecution, it was necessary to show that it was at an end; and the refusal of the Grand Jury to act on it, would not have been a final termination of it; for the defendant might have applied to another Grand Jury, who might have thought proper to present the defendant.

The motion is dismissed.

Justices *Nott*, *Gantt* and *Johnson* concurred.

Mr. Justice *Richardson* was absent at the trial of this case.



HENRY MIDDLETON vs. JOHN MASS.

A Deed cannot be admitted, as an ancient deed, by only giving an account from whence it came, &c. but there must have been possession under it.—(a.)

THIS was an action of trespass to try the title to a tract of land, originally granted to *William Bull*, in 1737. The grant to *Bull* was produced on the part of the plaintiff, and he then offered, in evidence, a deed from *Bull* to *James Ogletthorpe*, under whom he claimed, and from whom he deduced a title, dated in 1739, which had been

proved before a magistrate, and recorded in the Auditor's office, a few days after its execution ; but he offered no proof of its execution, nor did he prove any possession of the land or any act of ownership over it, by himself or any other person, through or from whom, he deduced his title ; so that the question was whether it was admissible as an ancient deed, without proof of its execution ?

The Presiding Judge being of opinion, that it was not, the plaintiff then offered to prove, that the deed had been in the possession of himself and those under whom he claimed, for more than thirty years, and contended, that it ought to be admitted on this proof ; but the court thought otherwise, and the plaintiff was nonsuited.

A motion was now made to set aside the nonsuit, on the ground, that the deed ought to have been received in evidence, as an ancient deed, on proof of the possession of the deed, alone, for the time mentioned.

Mr. Justice *Johnson* delivered the opinion of the Court.

Until this case occurred, I did not suppose, that this question admitted of any doubt ; for the converse of the proposition contained in the motion, is certainly recognized in the case of *Thompson vs. Bullock*, (1 Bay, 357,) and the practice, so far as I have been conversant with it, accords with that view of it ; but the question is made and I understand there is some diversity in the practice in the different parts of the state, and in the opinions entertained by the bar on the subject ; it becomes, therefore, necessary to consider it and to put it to rest.

Mr. Justice *Buller*, in his introduction to the law, relative to trials at *Nisi Prius*, 56, from whence the whole doctrine is drawn, says, if the deed be thirty years old, it may be " given in evidence, without any proof of its execution." " There ought," he adds, " to be some account given of the deed, where found, &c." Regarding this as a finished sentence, it would seem to follow, that it was only necessary to show, that the deed had been in the possession of the party claiming under it, or in a place

where, from the nature of its provisions, it would probably be deposited; and this is doubtless a correct conclusion, so far as relates to a peculiar species of writings which are in some measure to be regarded as public property, and partake in some degree of the character of records; some of which, are enumerated in *Phillipps* 349. And that this was Mr. Justice *Buller's* opinion, is, I think, obvious; for, he says, "though a deed of feoffment be proved to be duly executed, yet that is not sufficient to convey a right, unless livery of seisin be likewise proved." (*Buller's N. P.* 256.) However, when the deed is proved and possession has gone along with it, then livery of seisin shall be presumed, &c. It is not therefore the place only, where an ancient deed is found, that always makes it evidence, but it is when the possession is according to the provisions of the deed. (*Vide Phillipps* 349. *Dunlap's Ed. and Note a.*)

Independent however of authority, it appears to me, the reason and propriety of the rule is apparent, and the more so from the only reason which I have seen in opposition to it. It is, because old things are hard to be proved. Now, if this be a good reason, it operates with a two-fold force on the opposite side of the question; for it is certainly more difficult, to say the least of it, to disprove an old thing than to prove it, especially when in most cases the party would be called on to do so without notice of its antiquity or the necessity of doing it. Policy requires, that the possession of individuals to their landed estates should be shielded by every legitimate means; for it is, in truth, the sheet anchor of the rights of a great proportion of the citizens of this country, to such property. And hence it is, that after a lapse of thirty years, when it may be reasonably presumed, that the witnesses to the deed are dead, or, in the transitory state of the community, they are removed without the knowledge of the party, the law will presume the legal execution of the deed in favor of a possession, according to its provisions. But certainly no such indulgence is due to him, who (as in the present

case) neglects, for almost a century, to assert his claim by one single act of ownership. The doctrine contended for, on the part of the motion, might, in its consequences, be productive of incalculable mischiefs; for although it is not now usual to enter upon a course of villainy, the fruits of which are not to be reaped for thirty years to come, yet establish the rule contended for, and it opens the door, and many will no doubt find an easy entry. On the other hand, it is conceived, that no such mischiefs can ensue. Apprize the owner of the danger to which he is exposed, he has the power, and will avert its consequences.

The motion must be discharged.

Justices *Colcock*, *Nott*, and *Gantt*, concurred.

(*u.*)—See *Barr vs. Gratz*, 4 *Wheat. Reports* 221; where, it seems, possession of the deed was held sufficient. R.

MATTHEW O'DRISCOLL vs. HUGH M'BURNEY.

After judgment had been entered up, and execution issued, without the costs being inserted in either, the Court may give leave to the party to amend, by inserting the costs.

THIS was a motion to amend proceedings; argued before Mr. Justice *Johnson*.

In this case, the judgment had been entered up in blank, as to the costs. Execution had been issued, in which the costs were included. On motion, the execution was quashed. The defendant then gave a notice of taxation to the plaintiff; and after the costs were taxed, this motion was made for leave to amend the judgment by inserting the costs; which was granted.

A motion was now made to reverse the decision of the Presiding Judge, the same being, as was insisted, contrary to law.

Mr. Justice *Colcock* delivered the opinion of the Court.

On this subject, the statutes and acts of assembly are so comprehensive, so clear, and so explicit in their language,

that it is a matter of surprise, that any doubts should be entertained as to the authority of the Court to order the amendment in the present case. It was anticipated by *Judge Blackstone*, that as the net of technical jargon, in which justice had been so long entangled, was destroyed by these statutes, that this unseemly degree of strictness would in a few years be no more remembered. The first statute (14 Ed. 3, c. 6,) gave the power to amend process, where there was *one syllable or one letter* too much or too little. (2 *Sellon Prac.* 455.) But the 8th Hen. 6, c. 12, extended to the Judges the power of amending "any record, process, word, plea, warrant of attorney, writ, panel or return," ("in affirmance of the judgments of such records and processes.") (*Ib.*) The 27th Eliz. c. 5. and 4 and 5 Anne, c. 16, gave power to amend all imperfections, defects and wants of form after demurrer joined and entered, except such as the party demurring shall specially and particularly set down. (*Ib.* 462, 463.) The 16 & 17 Car. 2, c. 8, declaring that after verdict, "judgment thereupon shall not be stayed or reversed, for default in form or lack of form," or for certain other defects or irregularities, enumerating a great number of particulars of form; and concluding, "that all such omissions, variances, defects and all other matters of like nature, not being against the right of the matter of the suit, &c. shall be amended." (*Ib.* 464.) The 4th of Anne, c. 16, declares, that the statute of *Jesfairs* shall extend to judgments entered up on confession, *nil decit* or *non sum informatus*, which shall be amendable, as judgments obtained on verdicts. And the power is extended to all suits and to all the Courts of record in the kingdom. And lastly, by our act of 1734, (*Grimke P. L.* 139. *Brev.* 22,) writs of error and appeal are made amendable; and the only limits to the exercise of these powers, is as to criminal cases.

There are other statutes of force in Great Britain, on this subject, which we have nothing to do with, and which, I am aware, have led to mistakes on this subject. But upon the brief review which I have taken of those, which

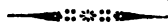
are of force here, I think, all doubt, as to the authority exercised by the Presiding Judge, in this case, must vanish.

The motion is discharged.

Justices *Bay, Gantt, Nott, Johnson* and *Richardson*, concurred.

White for the motion.

Pettigru, Solicitor, contra,



KINSEY BURDEN vs. Mrs. S. M'ELHENNY.

The slightest acknowledgment of a debt, is sufficient to take the case out of the statute of limitations.—(a.)

Defendant, referring the examination of the accounts to her agent, or to one acting as mutual agent, is thereby to be understood, as saying whatever shall be found due, I will pay.

THIS was an action tried before Mr. Justice *Johnson*, Charleston, May, 1818, to recover the balance of an open account, due in the year 1800, by Mrs. Sarah Wilkinson, afterwards Mrs. M'Elhenny. A suit was commenced in 1809, which abated by the death of the defendant's husband. A second suit was immediately brought, and after it had been commenced, the defendant in conversation with Mr. Deließeline, *requested him to examine the accounts, observing that it had remained so long that she thought it had been settled; and she expressed a wish that he should have reference to certain papers.* The witness did not examine the accounts, because he had before done so, in the life time of defendant's husband, and found them correct.

The pleas were *non assumpsit*, and *non assumpsit infra quatuor annos*.

The Jury found a verdict for the plaintiff.

A new trial was now moved for, upon the ground, that the evidence was wholly insufficient to revive the plaintiff's remedy, and take the case out of the statute of limitations.

Mr. Justice *Colcock* delivered the opinion of the Court.

I think it is high time this question was at rest. I lay it down, that *a bare acknowledgment of a subsisting debt is sufficient to take a case out of the statute of limitations.* The act was intended as a shield to protect from the payment of debts, which had been already discharged.—Amidst the casualties of life, receipts or other evidences of payment, are frequently lost; and it was found, that the estate of deceased persons would be particularly liable to injury without the aid of this act. Wherever a moral obligation exists, there the law raises an assumption. Where a debt is due there is a moral obligation to pay; and would it not be absurd and contradictory so to construe the act as to oppose this long established, wise and just, principle of the law? I am aware, that there are contradictory opinions and decisions on this subject. The weight of authority however will be found to be decidedly in favor of the rule, which I have laid down. (1 *Schwyn*, 150.) The slightest acknowledgment has been holden sufficient; as saying “*prove your debt, and I will pay it.*” “*I am ready to account, but nothing is due.*” (*Trueman vs. Fenton*, *Cowper* 548.) The defendant, meeting the plaintiff, said to him “*what an extravagant bill you have delivered me.*” Lord *Kenyon* held this a sufficient acknowledgment, that something was due.—(*Lawrance vs. Worrall*, *Peake N. P. C.* 93. *S. C.* 6 *Esp. N. P. C.* 92.) So in *Clarke vs. Bradshaw*, (3 *Esp. N. P. C.* 155–7.) *Bradshaw* saying “*plaintiff had paid money for him, twelve or thirteen years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law from the length of time.*” Lord *Kenyon* held it to be sufficient to take it out of the statute. The defendant had applied to the court in an affidavit for leave to plead the statute of limitations, that since the bill of exchange, on which the action was brought, became due, which was more than six years before, no demand of payment had been made of him: This was deemed sufficient to be left to the Jury, as an acknowledgment. And the

Jury having found a verdict for the plaintiff, the court refused to grant a new trial. (*Bryan vs. Horseman*, 4 East 599, and note *a.* to page 604.) So where a letter was written by the plaintiff's attorney on being served with the writ, concluding in ambiguous terms, neither expressly denying nor admitting the debt, it was holden that such letter ought to have been left to the Jury to consider whether it amounted to an acknowledgment of the debt, so as to take it out of the statute. (*Lloyd vs. Maund*, 2 Term Rep. 760. *Bicknell vs. Keppel*, 1 New Rep. 20.)

In the case before us, the facts were submitted to the Jury, with a direction from the Judge, that the rule now laid down should govern, and I think the determination a correct one. The defendant referred the examination of the accounts to her agent, or to one acting as a mutual agent, by which she is to be understood as saying, I know that there was a debt, though I thought it paid, whatever shall be found due, I will pay.

The motion is dismissed.

Justices Bay, Nott, and Johnson, concurred.

Grimke, for the motion.

Hunt & Parker, contra.

(*a.*)—The Exors. of WM. BOYD vs. The Exors. of JAS. CARMICHAEL.

THIS was an action of assumpsit, on two Notes of hand, tried before Mr. Justice Richardson, at Orangeburgh, Spring Term, 1819. The notes had been given by the defendant's testator and one Warnock. And from the time which had elapsed, they appeared to be barred by the statute of limitations. The only question was, whether the testimony, offered to prove a subsequent promise, was sufficient to save the case from the operations of the statute?

John Warnock, son of one of the drawers of the notes, swore, that a short time before his father's death, he heard him say, *he believed the notes were not satisfied; he expected money was still due by Carmichael.* Carmichael afterwards desired him to inquire of Boyd if any thing had been paid on the notes, or any arrangement made for that purpose by his father, as he had not been called on.

The Presiding Judge, after stating the law to the Jury, instructed them, that, if they thought this evidence amounted to an acknowledgment, that the money was still due, the law would imply a promise to pay, and they must find a verdict for the plaintiff; but on the contrary if it did not, the verdict must be for the defendant.

The Jury found a verdict for the plaintiff.

This was a motion for a new trial, on the ground, that the verdict was contrary to the evidence.

Mr. Justice *Nott* delivered the opinion of the Court.

As there is no exception taken to the charge of the court, in this case, we are to conclude, that the law was correctly expounded and the facts fairly submitted to the Jury. The case then, resolves itself into the question, whether they have so far mistaken the testimony, or drawn such incorrect conclusions from it as will authorize this court to interfere and set aside their verdict?

The act of limitations has sometimes been held to be a bar not much to be favored, and one which ought to be construed with great strictness. For my own part however I consider it a very beneficial law, and that it is entitled to the same liberal exposition as any other act. And although it may sometimes be made an engine of fraud, by a dishonest and ungrateful debtor, yet, I think it more frequently operates as a shield and protection to the ignorant and helpless, who have no other means of defending themselves against the unjust demands of rapacious and dishonest creditors. But the number of cases, coming within its provisions, have scarcely left a question undecided to which they could give rise. And among the decided cases I consider it now well settled, that a clear and explicit acknowledgment of the debt, will save it from the operation of the statute. (*Yea vs. Fouraker*, 2 Burr. 1099. *Trueman vs. Fenton*, Cowper, 548.) And for the best of all possible reasons; a person is always permitted to renounce what is for his own benefit.

The acknowledgment of a debt always implies a promise to pay. And it cannot require higher evidence to revive a stale demand, than to establish a new one. Even a conditional promise is sufficient to take a case out of the statute. (*Heyling vs. Hastings*, 1 Salk. 29. S. C. 1 Lord Ray, 389, 421.)

A reference to arbitration has been held sufficient.

But in this, as in every other case between positive proof, which is certain, and light presumption, which proves nothing, the shades of difference are so infinitely multiplied that much must always be left to the sound discretion of the Court and Jury. The evidence of acknowledgment in this case, I think of a very equivocal character. And I should have been very well satisfied, if the Jury had found a verdict for the defendant. But I think it was a question proper for their consideration. (*Lloyd vs. Maund*, 2 D. & E. 760.) It appears to have been fairly submitted to them. And although this Court would not, in all proba-

bility, have found such a verdict, they do not consider it so manifestly contrary to evidence, as to authorize them to set it aside.

The motion, therefore, must be discharged.—(b.)

Justices *Gantt*, *Richardson* and *Johnson*, concurred.

Stark, Solicitor, for the motion.

Felder, contra.

(b.)—See *Executors Gray vs. Kernahan*, 2 Const. Rep. 67. *Rowcroft vs. Lomas*, 4 Maule & Selwyn, 457. *Gibbons vs. M'Casland*, 1 Barn. & Ald. 692-3. *Swan vs. Sowell*—*Id.* 760. R.



W. W. TRAPIER, Administrator of JNO. SMITH vs.
THOMAS R. MITCHELL.

If a plaintiff sue as Executor or administrator, he must make proof of his letters testamentary, or of administration; and defendant must pray oyer, and make such objections thereto as he like; or if no proof be made, he must demur.

But if the defendant plead the general issue, he admits the plaintiff properly in Court.

THIS was an action of debt on bond, (tried before Mr. Justice *Nott*, at Georgetown, spring term, 1819,) brought by plaintiff, as administrator of John Smith.

The defendant had pleaded *non est factum*, on which issue was joined.

The first day of the Court, next after the proceedings were thus made up, the defendant's attorney moved for leave to plead, that the plaintiff was not administrator. That motion was refused, and the plaintiff had a verdict.

This was a motion for a new trial, and that the defendant might have the benefit of his motion made in the court below.

Mr. Justice *Nott* delivered the opinion of the Court.

This question having been decided, and the practice of our courts conformed to it, for the last fifteen years, it is not necessary to quote authorities in support of the opinion now delivered. In the case of *Reynolds vs. Terrence*, decided at Columbia, the rule was laid down as I think

the law is, that when a person sues in the character of an executor or administrator, he must make proof of his letters testamentary, or of administration, as the case may be. If he fail to do so, the defendant may demur to the declaration. If he make proof, the defendant may crave oyer, and the letters must be produced for his inspection. He may then take any exception to them by pleading or otherwise that he may think proper. But if he then plead the general issue, he admits the plaintiff properly in Court; and he is not bound to produce his letters afterwards. (*Exors. vs. Oldham, Haywood's Rep. 165. Berry's Adm'r. vs. Pullam, Do. 16.*)

The plea of *ne unques Exor.* is a plea to the disability of the plaintiff, and does not go to the merits of the action. And when the regular order of pleading is conducive to the ends of justice, it ought not to be dispensed with.

The motion in this case must be refused.

Justices Colcock, Gantt, Johnson and Richardson, concurred.

E. P. Simons, for the motion.



SAMUEL WHARTON vs. C. & H. O'HARA.

On an action to recover back money paid for prime Coffee, which turned out to be damaged, the difference, only, between prime Coffee, and that of inferior quality, can be recovered.

An action for money had and received, will not lie to recover back the purchase money, where the property has turned out to be unsound, unless there has been a return of the property, or at least a tender of it, or where there has been an entire failure of consideration.—(a.)

Where the plaintiff advertised Coffee as prime, and represented it, as such, at the sale, (auction) though he exposed the bags containing the same, which might have been examined, yet, he is liable to the purchaser for the deficiency, if damaged.

THIS was an action of *indebitatus assumpsit*, brought in the City Court, to recover back 73 dollars 63 cents. which plaintiff had paid for four bags of coffee, purchased at

auction, as *good coffee*, which was found afterwards to be *damaged*.

It appeared in evidence, that the coffee had been advertised previous to the sale, as *prime coffee*, and that a *sample* was exhibited at the time of sale, which was *sound and good*. It was also proved, that it was *exposed in bags*, and might have been examined, by the purchaser, before and at the time of sale. And that the plaintiff had it in possession about *six weeks* before he discovered the unsoundness.

The Judge of the Inferior Court, instructed the Jury to find for the plaintiff, and they found for the full amount of the purchase money.

Defendant appealed to the Circuit Court, and moved for a new trial, on the following grounds :

1st.—That there was no express warranty of soundness, and being sold at *auction*, the law would not imply one.

2d.—That having been six weeks in plaintiff's possession, it might have been damaged after the purchase.

3d.—That if the plaintiff was entitled to a verdict, he should only have recovered the difference between good and damaged coffee, and not the whole amount of the purchase money.

The case was tried, January Term, 1818, at Charleston, before Mr. Justice *Grimke*, and the verdict of the City Court was supported.

This was a motion to reverse that decision, and to grant a new trial on the grounds above stated.

Mr. Justice *Nott* delivered the opinion of the Court.

It is not necessary to determine in this case, whether the doctrine of implied warranty, which is maintained in our courts, applies to sales at auction or not. For even though the law might not imply a soundness of property merely from the soundness of price, yet *misrepresentation* is considered as amounting to an express warranty.—Advertising this as *prime coffee*, and exhibiting a part of it as such, was tantamount to an express undertaking of the

seller, that the article was of the quality which it was represented to be. And although it was publicly exposed to inspection, yet there was no reference made to the purchaser to examine and judge for himself. But on the contrary, a specimen was exhibited by which the whole was to be judged; and he purchased on the faith and credit of the vendor, and not on his own view. And although I do not see any ground in this case to suppose that an actual fraud was intended, yet, the vendor having advertised it as *prime* and represented it, at the sale, as such, was bound to make it good. The same degree of good faith ought to be observed in sales at auction, as in other sales.

2d. Whether the coffee was damaged at the time of the sale, or became so afterwards, was a question for the consideration of the Jury; and the presumption, that it became so afterwards, I think, was very well repelled by the evidence offered on the trial.

3d. But defendant's strong hold is on the last ground. In England it is held, that an action for *money had and received*, or *indebitatus assumpsit*, will not lie to try a warranty. (*Power vs. Wells*, Cowper 819. *Stuart vs. Wilkins*, Doug. 18.) The party must declare on the warranty. And it was held by this court in the case of *Fowler & Williams*, at Columbia, that when the plaintiff brought this action to recover back the purchase money of a horse which had died, that the action would not lie, as he had not tendered back the property. Whether that decision is to be supported or not, I apprehend it is well settled, that a person cannot recover on a single count for *money had and received*, unless there has been a *return* of the property, or at least a *tender* of it, or where there has been an *entire failure* of consideration. Whether there was any count in this declaration on which plaintiff could recover, does not appear. But it is obvious from his own showing, that his demand arose on account of the coffee having been damaged, and not that it was entirely worthless. He was only therefore entitled to recover the difference between prime

coffee and that of inferior quality. He was not entitled to the coffee and money both; and therefore a new trial must be granted.

Justices *Colcock* and *Cheves* concurred.

Mr. Justice *Gantt* dissented.

Grimke, for the motion.

Belser, contra.

(a.)—See *Byers vs. Bostick*, 2 Const. Rep. 75.

R.



GEORGE SKINNER vs. FARGUS M'DOWELL.

Possession alone will not enable the plaintiff to maintain *trespass* against the *rightful owner*.

THIS was an action of trespass, tried before Judge *Nott*, at Georgetown, April term, 1819.

The plaintiff proved, that a negro, the subject of this dispute, was in his possession.—That the defendant, with two other persons, overtook him on the Georgetown road. One of the persons, a Mr. Davis, claimed the negro, and the defendant took him away. No violence, either by word or action, was used by defendant.

On the part of the defendant, an offer was made, to prove that the negro was his property, which was admitted by the counsel for the plaintiff.

A motion was made for a non-suit, which was overruled; the Presiding Judge ruling that *possession* was sufficient to maintain the action.

A verdict was then found for the plaintiff.

A motion was now made to set aside the verdict, on the ground, that *possession alone* will not enable the plaintiff to maintain *trespass* against the *rightful owner*.

Mr. Justice *Colcock* delivered the opinion of the Court.

I take it to be a well established principle, that a person may take possession of his own property wherever he may find it, though not permitted to use violence or do an injury to another. In treating of the action of trespass for injuries to personal property, it is considered;

" 1st. With reference to the thing affected.

2d. The plaintiff's right thereto.

3d. The nature of the injury—and

4th. The situation in which the defendant stood, as whether tenant in common, bailee, &c."

" With respect to the plaintiffs interest in the property affected, he must, at the time when the injury was committed, have had an *actual* or *constructive* possession, and also a *general* or *qualified property* therein; which may be either : 1st, in the case of the absolute or general owner entitled to immediate possession; 2dly. The qualified owner, coupled with an interest, and also entitled to immediate possession; 3d. A bailee with a mere naked authority, unaccompanied with any interest, except as to remuneration for trouble, &c. but who is in actual possession; 4th. Actual possession, though without the consent of the real owner, or even adverse." In which latter case one may maintain trespass or trover against all *but the real owner*. An instance of which is the finder of any article. (*Armory vs. Delamire*, 1 Str. 505. 2 Saunders 47a. n. 1.) It is even said, that one who has an *illegal* possession may maintain this action against all but the real owner. (*1 Chitty*, 167.) When violence is used, the owner is not subject to an *action* for the taking of the property, though he may be subjected to a *prosecution* for the violence, or to an action for any injury which may be done to the property of the plaintiff in the act of taking. Where a plaintiff is in possession of land under a void lease, he may maintain possession against a wrong doer. But if a defendant can show himself entitled to the land or to the possession, he cannot be made responsible to a person who has nothing more than a naked possession, even though he entered upon and took possession of the land by force. (*4 Johnson Rep.* 150. *Taunton vs. Costar*, 7 Term Rep. 427.) If the entry be with strong hands, or a multitude of people, it is an offence for which the party entering must answer criminally, but this cannot render him a trespasser against a party, who has no interest in the *locus in quo*, and

is in fact a wrong doer in consequence of his illegal entry. So also it is said, where a tenant from year to year holds over after proper notice to quit, the landlord enters by force and turns him out, he cannot maintain trespass against the landlord.

The motion is granted.

Justices *Bay, Johnson* and *Nott*, concurred.

Mr. Justice *Gantt*.

I dissent in this opinion. At the time of the taking, the plaintiff had a possession; and till the right of property was tried by an action between the several claimants, it ought not to have been invaded. The right to this negro was afterwards tried, and established, to be in Davis, but this cannot have a retrospective operation to justify an act of taking, which was at the time illegal.

Dunkin, for the motion.

Wilson, contra.



EXIX. of GORDON vs. CHARLES GOODWIN & A. BEGGS.

Where a party sues in the right of another, as Executor, &c. the defendant, if he wish to make any objection, because others are not joined, he must plead it in abatement, and the court will not grant a nonsuit; but if he sue in his own right, the non-joinder of others may be the cause of nonsuit.

Where a father purchases property with money out of his own estate, and drew a bill of sale of the same to himself, as agent to the trustees of his wife and children, and kept the same in secret, and used the property as his own, and afterwards sell the same to a *bona fide* purchaser, for a valuable consideration, without notice, the court will consider such bill of sale as fraudulent against such purchaser.

The court will require great strictness in proving, that the property was purchased by the trust fund, after appearing as the husband's, although it be expressed, in the bill of sale, to have been purchased by the trust fund.

In all cases where a party aiding and assisting, by furnishing another with the show of capital, he makes whatever capital he so furnishes absolutely liable for so much as is obtained upon its credit: *ut videtur*.

THIS case was tried before Mr. Justice *Johnson*, at Barnwell, April Term, 1819.

The testator, Ambrose Gordon, made his will, in Georgia, and died there, appointing the plaintiff, Executrix, and two others, Executors. A copy of the will was lodged in the Ordinary's office, in Edgefield district, and the plaintiff alone qualified in this state. She commenced this action, without naming the other Executors, for the recovery of certain negroes in possession of defendants.

The defendants pleaded the general issue, and the statute of limitations.

On the trial, the defendant's counsel moved for a non-suit; because, by the production of the will, it afforded evidence, that there were other persons who ought to have been plaintiffs in this suit.

The court overruled the objection.

The evidence then made the following case :

Charles Goodwin, one of the defendants, by a bill of sale, dated the 6th day of January, 1802, conveyed to plaintiff's testator, the negroes in dispute. This instrument was executed in Savannah, and the negroes were at that time in Barnwell district. The bill of sale had an indorsement on it, made by Benjamin Sims, some time in the same year; stating that at the request of Colonel Gordon, he had called on defendant, Goodwin, for the negroes in dispute, as the agent of Gordon; that they were delivered to him by Goodwin, but suffered to remain in his possession until the further orders of Gordon, who died soon afterwards.

Hartford Montgomery, examined by commission, stated that some time in 1812, he accompanied the plaintiff to the house of defendant, Beggs, where he *demanded* the negroes in dispute—he *refused* to deliver them.

Benjamin Sims was also examined by commission, who stated, that the indorsement on the bill of sale was correct, with the addition, that Major Goodwin, the other defendant, expressed much gratitude for the kindness of Gordon in advancing money on former occasions.

Thomas Wimberly said he knew the negroes, and stated their annual value to be \$ —. This witness said he had

never seen them in Goodwin's possession ; but they were always held by Beggs since he knew them.

John F. Gray gave a similar account of the negroes in dispute. He said Beggs married Goodwin's daughter in 1806, and he had seen the negroes in his possession since 1812.

The defence was entirely on the part of Beggs. He introduced a deed for one of the negroes, from Aaron Richardson, dated in 1799, to C. Goodwin, as agent of John H. Goodwin, of London, trustee of Elizabeth Goodwin, securing these negroes to the entire and exclusive use of Mrs. Goodwin, during life, and at her death to the issue of her body, share and share alike. This bill of sale acknowledged the money to have been paid by Charles Goodwin, *as the agent* of the trustee.— Another deed from Leroy Hammond (of the other negroes in dispute) to Charles Goodwin, of the same character, and to the same uses in every respect, was next read in evidence, which bore date, January, 1801. Mrs. Goodwin was dead, and the defendant, Beggs, having intermarried with one of her daughters, insisted on his right and possession, derived from these deeds, as absolute to the negroes in question.

In reply, a letter from the defendant, Charles Goodwin, to A. Gordon, dated 2d. May, 1801, was adduced, soliciting, on the faith and credit of the money which might be raised by the sale or hire of the negroes, a loan of money. This letter describes the negroes as the property of C. Goodwin, and acknowledges his private concerns not only embarrassed, but his pecuniary resources exhausted.

The Court charged the Jury that there was not sufficient evidence of possession in Beggs to enable him to avail himself of the statute of limitations : That, as to Goodwin, his possession, if they believed Sims' testimony, was the possession of Gordon and his representatives, and therefore he could not set up the statute. But if they believed the transaction between C. Goodwin and A.

Richardson, and Hammond, was a fair one, and not fabricated to defraud creditors and purchasers, then Goodwin held as *agent* or *trustee* for his children; his possession was theirs, and they ought to have the benefit of it. The Court, further charged, that in a Court of Law, it was the duty of the party, alleging fraud, to prove it; and that a Jury were not to presume it, from slight circumstances, particularly to the prejudice of third persons, not parties to the transaction. The Jury found a verdict for the plaintiff for the negroes in dispute and \$ 1250 damages.

The defendant now moved for a nonsuit;

Because the plaintiff should have included the other executors as plaintiffs; and the Court ought to have ordered the nonsuit, on the motion below. And for a new trial:

1st.—Because the Jury presumed fraud in finding for the plaintiff, of which there was no proof.

2d.—Because, on the plea of the statute of limitations, defendant, Beggs, should have had a verdict, since the possession of C. Goodwin, from the year 1801, was his possession.

3d.—That the proof, as to the value of the hire, was vague and indefinite; and the verdict, as to damages, excessive.

Mr. Justice *Richardson* delivered the opinion of the Court.

The motion for a nonsuit cannot prevail, because the rule of pleading is established, that defendant must take advantage of the nonjoinder of a co-executor, by pleading in abatement, after *oyer* of the probate. This is the distinction when the plaintiff sues in right of another, and when he sues in his own right. In the latter case, the omission may be cause of nonsuit, but not in the former. (1 *Chitty* 13. 1 *Saund.* 291.)

The verdict too, as to the amount of damages, is supported by the testimony which need not be more particularly narrated. This was a question for the Jury; and the verdict is not enormous.

As to the possession of the negroes by Charles Goodwin, it evidently appears from the evidence of Benjamin Sims, that it was not adverse from the plaintiff's testator, but really his possession.

But I hasten to the ground relied upon by the defendant, and seriously argued by their counsel, for a new trial, to wit: Because the Jury presumed fraud, in finding for the plaintiff, of which there was no proof.

The question, submitted to this Court, is, can the verdict which deprives the children of Mrs. Goodwin of these negroes in favour of a *bona fide* purchaser, for valuable consideration, from C. Goodwin, her husband, and *without notice* of the settlement in trust, be supported by the testimony?

The facts were as follows: In May, 1799, Charles Goodwin, the husband, styling himself *agent* of Chamberlain, and John Goodwin, trustees of Elizabeth, the wife of the said Charles, purchased one of the negroes in dispute. In January, 1801, the said Charles Goodwin, styling himself as before, purchased the other negroes. The consideration money was said to be received of the trustees, by the hands of the said Charles, and the negroes to be holden in trust for Elizabeth his wife, and her children. On the 23d May, 1801, Charles Goodwin wrote to the plaintiff's testator, Ambrose Gordon, parts of which letter I will refer to. On the 6th January, 1802, Charles Goodwin, in consideration of \$1550, conveyed the negroes named in the letter, to Ambrose Gordon, under which conveyance his executrix now sues. The bills of sale to Charles Goodwin, as agent, are in his hand writing, and never recorded; nor does it appear that Ambrose Gordon could have had notice of them. The negroes appeared, of course, as the property of Charles Goodwin, who held possession of them, and described them as his own property. This letter avows his pecuniary embarrassment. In this situation, he sells the negroes, to all appearance, his own, to A. Gordon. If Charles Goodwin, thus embarrassed, paid the consideration money for these negroes to

Hammond and Richardson, out of his own pocket, though he took a bill of sale, which is kept in secret, for his wife and children, it would require a kind of hardihood to contend seriously, that there would not be grounds to presume a fraud, even at Common Law. And we would much more readily conclude there was a fraud under the statute of 27 Eliz. made expressly to protect purchasers, for valuable consideration, against mere voluntary settlements of that kind.

But, did not Charles Goodwin actually pay the money out of his own estate? He did pay it; drew the bills of sale to himself; kept them *in secret*, and used the negroes as his own. On the other hand, he styles himself *agent* of certain trustees, which may suppose a trust fund. But are not these susceptible of easy proof? And can the mere expression of the husband, because put into writing, when he is himself charged with the fraud in covering his own estate, and deeply interested, can his mere expression be received as any proof whatever? I conceive not. But let it be called the expression of the vendor of the negroes; then he too, must be sworn to these facts, else there is still no testimony. If a husband were allowed to cover his property against creditors and purchasers by so simple a device, as naming trustees, calling himself their agent, and by the mere act of so doing, assuming, that there is a trust fund, the law, which is so watchful over mere voluntary settlements, would become literally blind. But besides the obvious necessity and reason for disregarding the mere expression contained in the bills of sale, there are not wanting adjudications to show that in such cases evidence of the trust fund is required. The case of *Cadogan vs. Kennett*, (*Cowp.* 434,) and those in 1 *Mod.* 76, and 2 *Ves.* 10 and 11, are in my judgment very strong. And according to the last case of *Cross vs. Glode*, (2 *Esp. Rep.* 574,) the Court would require great strictness to prove the property purchased by the trust fund, after appearing as the husband's. But suppose for a moment, that there were trust funds and trustees, who

actually authorized the appropriation of the wife's money, in the purchase of these negroes, is there not great reason to say that they too have committed a legal fraud upon the purchaser, in keeping the transaction a profound secret, and suffering their agent to exhibit the property to the world as his own, thereby assisting him to obtain money upon a fictitious capital? It is assisting one man to cheat another, which is not allowable. In all such cases, the party aiding and assisting, by furnishing another with the show of capital, makes whatever capital he so furnishes, absolutely liable for so much as is obtained upon its credit. If the trustees have done so, they have committed a fraud upon A. Gordon, whose representative must recover the negroes, or their value. And the resort of Mrs. Goodwin would be evidently to those trustees for their more than unguarded use of her trust fund.

The motion is unanimously dismissed.

Justices *Bay*, *Nott* and *Gantt*, concurred.

Mr. Justice *Golcock* was absent when the case was argued.

Grimke, for the motion.

Martin, contra.



MISSBROON & TIMMONS vs. WALDO & FREEMAN.

A sound price implies a sound commodity; and though the discovery be made in a foreign port, yet an action will be supported to recover back for the failure of consideration.—(a.)

It is not only the civil law rule, but the view of the common law, which has always been adopted in this state, *ut semble*.—(b.)

THIS was an action brought for the value of four barrels of bread, together with the freight to Havanna, and the duties there paid.

Captain *John Pratt* was the only witness produced. He proved, that he, with Captain *Crocker*, was called on, in, Havanna, by Mr. *Drake*, a merchant of that place, to

examine twelve barrels of bread, which the defendants admitted were purchased of them : That on examination, it appeared, that these barrels were fraudulently packed ; that, at both ends was new bread of English stamp, but in the middle, the bread was *old, musty, and not fit for hogs to eat* ; that the bread was turned out on deck, and they separated the bad from the good ; that the bad, which was totally worthless, filled four barrels ; and that it was thrown over board, being unfit for any use ; that the freight charged was at a fair price, and he believed the duties were higher than estimated in the plaintiff's demand.

The Judge charged in favor of the plaintiff.

The Jury however found a verdict for the defendants.

A motion was made for a new trial, on the ground, that the verdict of the Jury was contrary to law and evidence.

Mr. Justice *Richardson* delivered the opinion of the Court.

It is the unanimous opinion of the Court, that the verdict is contrary to evidence. The doctrine is now established, that whenever a fair price is given, the commodity sold, with or without an express warranty, must be sound.

The whole doctrine, though sometimes considered new, is nothing more than the practical use of the plain moral maxim, that honesty is the best policy. I deem it in truth the *common law rule and no more* ; dispensing with what may be justly called the habit of the common law decisions, in requiring direct proof of a warranty, expressed at the time of sale ; as though the common law did not allow, in this one instance, of its favorite circumstantial evidence, which, as we are so often reminded by the best common law Judges, cannot lye, nor even of the *evidentia rei*. At all events, if a doctrine can be established and known, I believe this is settled and known. Sometimes doubted, it is true, by some individual Judges, but again settled under almost every change of the bench, uniformly in the same way, as in the foundation case of *Timrod vs. Shoalbread*. (1 Bay 324.) Guarded, as it is by the cau-

tion recommended in the case of *Rouple vs. M' Carty*, (1 Bay 480,) these adjudications have triumphed over every variety of opposition, and settled this law in South Carolina.

In the case before us the only evidence adduced, showed a total failure of consideration, and afforded even suspicion of fraud. At both ends of the barrels were loaves of English stamp, which, in the inspection of bread and biscuit, is perhaps equal to the old English sterling stamp; but in the centre was a musty collection which was equal to, and perhaps worse, than a mixture of base metals within pure silver. And though no forgery, yet, if the artifice of concealing unwholesome provisions within sound, could be brought home to an individual, it is questionable if an indictment for swindling would not lay. Policy as well as honesty and law, forbid our countenancing the mistake, that, unless the examination be within our ports, the evidence must fail. If such shipments to the *Havanna* were so encouraged, the Spaniards might well repay us in the like coin, and transmit us tobacco stems for best segars, or clay within their white sugar. All imaginable fairness must be required in commerce, especially where custom and convenience do not authorize a perfect inspection of every package. Such rules are especially wise in us, who are an importing people, and therefore look for great integrity from foreign merchants. If a case were required to illustrate such principles of common, honest, and obvious, policy, that of *Barnard & Yates*, (1 Nott & M'Cord 142,) sometimes called the *Gurry Case*, would be in point, where this moral doctrine is reconsidered, and we scrupled not a moment in making the foreign trader retake his blubber. Let us then be as severely just, when the sides are changed, and give the world no excuse for treating us ill.

A new trial is therefore ordered.

Justices Colcock, Nott, Gantt and Johnson, concurred.

(a.)—See *Barnard vs. Yates*, (1 Nott & M'Cord's Rep. 142.) Also, *Smith vs. M'Call*, Col. May 1821, in which case it was held,

that the law does not imply any warranty of the moral qualities of a slave.

(*b.*)—*Vide, ante* Vol. 1, 152, note *a.* And see the above opinion of *Smith vs. M'Call*, wherein Judge *Nott* says, "I have no idea myself that the Judges, who first established the doctrine, intended to introduce a rule of the Civil Law in opposition to the Common Law. I believe it was then considered as a rule of the Common Law. His Honor referred to Judge *Grose's* opinion in *Parkinson vs. Lee*, (2 *East's Rep.* 321,) where it is said, that the doctrine of implied warranties was unsettled, until Lord *Mansfield* said, "there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action."

The case alluded to, as having been decided by Lord *Mansfield*, is the case of *Stuart vs. Wilkins*, (*Doug.* 18,) which was decided in 1778, during our revolution: So that when the rule came to be settled in this country, not having heard of the decision in England, our court took their own view of the subject.

Since we have experienced the benefit and evil of the doctrine, we believe, that there are few Judges or Lawyers, in the state, who do not regret that the view, adopted, should ever have been taken. Nothing is more common than to hear it deprecated at the bar. And yet, as we have said before, *Cooper* and *Kent*, two very wise men, have expressed their approbation of the reasoning of the *civilians*; and God knows, the language of the former is strong enough.

R.

KENNEDY vs. WILLIAMS.

IN this case, where a sufficient number of Jurors, who were summoned on the original pannel, did not appear, and the Court ordered *talesmen* to be drawn and summoned, according to the Act of Assembly, and the sheriff summoned a person who had not been drawn, and who sat on the trial, which was not known to the parties, until after the Jury had brought in their verdict, it was held to be a good ground for a new trial.



CONSTITUTIONAL COURT

OF

South-Carolina, November Term, 1819—Columbia.

JUSTICES PRESENT THIS TERM.

ABRAHAM NOTT, DAVID JOHNSON,
CHARLES J. COLCOCK, JOHN S. RICHARDSON.
RICHARD GANTT,

NEEDHAM DAVIS vs. JAMES DAVIS.

In actions of slander a new trial will never be granted on the ground of excessive damages, unless they so far exceed all proportion to the injury, as necessarily to strike every one, at once, with the conviction that the Jury were led away by public prejudice or private feeling.

TRIED before Mr. Justice *Johnson*, at Columbia, October Term, 1819.

This was an action of slander, in which the plaintiff obtained a verdict for 500 dollars damages.

The declaration charged, that the plaintiff was a merchant, and that the defendant, intending to injure him in that behalf, said, &c. "*you are a damned rogue, and have got my money on your shelves :*" (*innuendo.*) That the plaintiff was dishonest and unfair in his dealings, &c. There were several counts in the declaration, charging the same words substantially, with the necessary *innuendos.*

The proof was, that the defendant in passing the plaintiff's store, in Columbia, without any provocation immediately preceding, stopped at the plaintiff's door, and looking in, said "*you are a damned rogue, and have got my money, or money's worth, on your shelves :*" which he

repeated several times. The plaintiff said nothing to him, and the defendant gave, at the time, no explanation as to what particular transaction the words referred to, and went away. There were several persons present, and some customers were then in the store, dealing. There was no proof of the word's having been spoken at any other time.

On the part of the defendant, it was proved, that the plaintiff was indebted to him at the time, in the sum of 1,000 or 1,200 dollars, as the security of John B. Thomas, who had failed and gone off, leaving the plaintiff to pay the debt. That the defendant had applied to the plaintiff to get a small quantity of sugar and salt, on account of this debt, but the plaintiff declined it. And on another occasion, the plaintiff said, as the defendant had sued him for this debt, he would not pay it, until he was compelled by a course of law. The defendant was proved to be wealthy. The defendant now moved for a new trial, on the grounds :

1st.—Because the damages were outrageously excessive.

2d.—Because the words, proved, had relation to the nonpayment of the debt due by the plaintiff, to the defendant, as the security of John B. Thomas, and the Jury ought therefore to have found for the defendant.

Mr. Justice *Johnson*, who tried the cause, delivered the opinion of the Court.

1st.—There are cases, in which excessive damages alone have been made the basis of a new trial; but they are rare, and I trust, that this Court will never add to the number, except in cases of the most imperious necessity. They are always a subject for the exercise of the sound discretion of a Jury; and this Court will never interfere unless they so far exceed all proportion to the injury as necessarily to strike every person at once with the conviction, that the Jury have been led away, either by public prejudice or private feeling; and notwithstanding I

am disposed to think, under all the circumstances, all the purposes of justice would have been attained by a verdict for a less amount than that found by the Jury, I am not prepared to say, that the verdict is of that character. An honest fame is of vast importance to every member of the community, and more so to the merchant than almost any other. The basis of his business is his credit and the confidence reposed in him. And, considering the wealth of defendant, the verdict does not strike me as bearing so great a disproportion to the injury as to establish the conviction, that it was given under an improper influence.

2d.—If words are spoken of a merchant, charging him with dishonesty or unfairness in dealing, no one will doubt they are actionable, (*2 Esp. Dig. Gould's Ed. 86;*) and if the words, spoken by the defendant, in this case, had relation to the plaintiff's conduct, as a merchant, the harsh term *rogue* would necessarily imply fraudulent practices.

Now, if we separate the evidence of the plaintiff from that adduced by the defendant, in relation to facts of which the by-standers could have no knowledge, and to which the defendant did not allude, so as to direct their attention to them, the case would be settled; for it seems to me impossible to infer any thing else from them than, that the plaintiff had, by unfair practices, as a merchant, added to his stock at the expense of the defendant. The rule, that words are to be construed *in mitiori sensu*, has long been exploded, and it is now well settled, that they are to be taken in that sense in which they would be understood by those who hear them, (*2 Esp. Dig. 98.*) That it is the province of a Jury to decide on the construction of words, which may apply to different subjects, I need only cite the opinion of this Court in this very case, when before it on a motion to set aside a nonsuit. Indeed, the position is, I think, self evident, that whenever there is evidence on both sides, the Jury must weigh it, and strike the balance. If then, the defendant, at the time of speaking the words charged, disclosed the facts to which he now pretends they alluded, I agree they

would have explained away the slanderous character of the words; and the introduction of them on the trial of the case ought to, and probably did, have their influence, in mitigation of the damages; but surely a defendant ought not to be permitted to publish to the world a gross slander, in relation to one subject, which is predicated on facts connected with another, which, if disclosed, would wholly explain away the slander. And I do think, that the keeping of them back furnishes a strong circumstance to show the malevolent motives with which they were uttered.

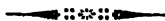
The motion, I think, ought to be dismissed.

Justices *Nott*, *Gantt*, and *Richardson*, concurred.

Mr. Justice *Colcock* dissented.

Stark, Solicitor, for the motion.

Gregg, contra.



SARAH BATES vs. WILKINS SMITH & JOHN M'CARTY.

In an action of trover against two defendants, where a conversion has been proven against but one, and a verdict found against both, a new trial will be granted, unless the plaintiff will discontinue as to the defendant, against whom no conversion was proved.

THIS case was tried before Mr. Justice *Johnson*, at Edgefield, October Term, 1819.

It was an action of trover, for a horse, in which the plaintiff had a verdict. Property in the plaintiff, and a conversion by the defendant, *M'Carty*, was satisfactorily proven; but there was no evidence whatever of a conversion by the defendant, *Smith*, and this circumstance furnished the only ground of a motion for a new trial.

Mr. Justice *Johnson* delivered the opinion of the Court.

There is no doubt, that the verdict is wrong, as relates to *Smith*, and it is equally manifest, that it is right as relates to *M'Carty*. It is unreasonable to send the plaintiff back and delay him, until a second trial can be had,

after there has been a full and fair investigation of the case, in which the liability of one of the parties is manifested; and it is equally unjust, that the other defendant, against whom there was no proof, should suffer by the verdict.

I am therefore of opinion, that a new trial ought to be granted, unless the plaintiff will discontinue as to the defendant, *Smith*, and this, with the unanimous concurrence of my brethren, is made the order of the Court.

Justices *Colcock*, *Nott*, *Gantt* and *Richardson*, concurred.



MICAJAH DINKINS vs. JESSE DEBRUHL.

In an action for an assault and battery, where an actual battery was proven, although a jury may give merely nominal damages, yet, they cannot find a verdict for the defendant; and in such case, a new trial may be ordered, unless the defendant agree to pay the costs of the suit.

THIS was an action for an assault and battery, tried before Mr. Justice *Johnson*, at Columbia, October Term, 1819.

It appeared on the trial, that the defendant charged the plaintiff with having stated a falsehood, calculated to lessen him in the estimation of Mr. *Herbemont*, a merchant, in whose employment he was clerk, which the plaintiff avowed and affirmed to be true, concerning which, however; there was no proof, except the opinion of a witness who thought it a fabrication of the plaintiff. That a good deal of mutual recrimination and abuse ensued, and the plaintiff turned off, affirming the truth of what he had said, and the defendant struck him two blows, the last of which knocked him down, and then kicked him, and gave him a bruise on the face; but there was no proof of the plaintiffs having sustained any serious personal injury.

The defendant had, at a preceding term, plead guilty to an indictment prosecuted by the plaintiff for the same assault, and on these facts being brought to the view of

the Court, the defendant was sentenced to one weeks imprisonment, and to pay a fine of twenty-five dollars, and the costs of the prosecution.

The Jury, contrary to the charge of the Presiding Judge, found a verdict for the defendant.

A motion was made for a new trial, on the ground that the verdict was contrary to law and evidence, in as much as the proof of the battery was clear and unequivocal, and there was no pretence of legal justification.

Mr. Justice *Johnson*, who tried the cause, delivered the opinion of the Court.

There can be no doubt of the legal inaccuracy of this verdict. Under the long and well established practice of the Courts in this state, the plaintiff had a legal right to pursue the defendant, both in a prosecution at the suit of the state, and a civil action for this offence; and the proof of his guilt was manifest. But I think there are strong circumstances of mitigation, and the verdict of the Jury, although legally erroneous, goes to show the importance which they attached to them.

The object of a prosecution at the suit of the state, for this offence, is a check in embryo to those commotions, out of which so many violent deaths and murders happen; and any individual of the community has a right to bring an offender to justice; and there he is punished for the violation of the public tranquility and good order of society. The defendant has expiated this part of his offence, in suffering the punishment already inflicted on him, and he has now only to answer to the plaintiff in his individual character, unconnected with society, for the personal injury which he inflicted on him. And this leads us to the consideration of the circumstances of the case.

The injury of which the plaintiff complains, is, that the defendant struck him twice, by which he was knocked down, and then kicked him once, leaving a bruise on his face; but there is no proof that he ever complained of any bodily pain, or that he was put to any inconvenience,

other than the feelings necessarily arising out of such an indignity. There may be many cases in which a much less injury might be the subject of very vindictive damages. But when it is recollected that the plaintiff had made representations of the defendant, who was quite a young man, calculated to traduce him in the opinion of his friend and patron, and through him the rest of the community, and affirmed and avowed it to his face, and that probably falsely too, (but whether true or false, I think not very important, for if the former, it was a breach of confidence reposed in him, and equally reprehensible,) and that he had atoned for his public offence, the Jury were, I think justifiable in regarding his case with some indulgence; and nominal damages were all that I think he was entitled to. In this case, however, I think the Jury have gone too far, and willing as I should always feel to support a verdict within the pale of their almost boundless discretion, it ought not to be done where there is a manifest infraction of the law. It would result in the dangerous and absurd principle, that law itself is a question of discretion, and not an absolute rule of right. But from the view taken of the case by the Court, supported by the verdict of a respectable Jury, the damages ought only to be nominal. Unwilling to enable the parties to harrass each other, or to perplex another Jury with the trial of such a case, unless constrained to do so by the rigid rules of law, I am unwilling to send it back.

It is unreasonable that the laws should hold out to a party a right of action and compel him to pay costs. The defendant ought, therefore, to pay the costs of this action. There are very many precedents in this court, for imposing terms on granting a motion for a new trial.

I am therefore of opinion, that the motion in this case ought to be granted, unless the defendant will release the plaintiff from costs.

Justices *Colcock, Nott, Gantt* and *Richardson*, concurred.

Gregg, for the motion.

Goodwyn, contra.

BIRT HARRINGTON vs. ARAMANUS LYLES.

A boatman is a common carrier, and is liable for all losses, except those occasioned by the act of God and the enemies of the country.

TRIED before Mr. Justice *Johnson*, at Newberry, October, 1819.

The plaintiff had shipped sixty-five bales of cotton on board the defendant's boat, to be carried from a landing on Broad river, in Newberry district, to Charleston, for him. The boat upset in the Santee canal, and threw the cotton into the water. She was speedily reloaded, and proceeded to her place of destination; and on her arrival, the consignee found some of the cotton wet and much injured; and procured a survey to be made, which fixed the loss at 225 dollars; and the actual loss on the sale by the consignee, amounted to 240 or 250 dollars; and this was an action to recover the amount of those damages.

The evidence, on the part of the defendant, was, that he was unusually careful, and a skilful patroon; that his boat was one of the best of her class, competent to carry the cargo then on board, and manned by a competent crew; that after she entered the Congaree river, she was lashed to another boat, of the same size, to guard against any accidents from upsetting, but that it became necessary to separate them to pass the canal; and that the day on which they entered the canal, an incessantly heavy rain had fallen, which wet the bales on top. One of the witnesses stated, that it was apparent, that the boat was, from that cause, top heavy, after she was separated from the other; that they remained that night in the canal; and that the defendant, to guard against her upsetting, lashed her to the bank and set poles on the opposite side, (a precaution rarely resorted to) and remained on board himself, until she went over, about midnight, without any obviously recent cause. It also appeared, that the cotton injured was at the bottom of the boat and resulted from the dripping of that on top; and the probability was, that if it had

been laid on the bank and suffered to drain, no injury would have been sustained.

The Jury found a verdict for the plaintiff for 225 dollars ; and a motion was now made for a new trial.

Mr. Justice *Johnson* delivered the opinion of the Court.

The whole of the grounds relied on, in the argument of this cause, are embraced in the question : Whether the defendant, like a common carrier, is liable for all losses, except those occasioned by the act of God or the enemies of the country ?

It was with great difficulty, that I could bring my mind to consent to the established doctrine on the subject of the liability of common carriers, when the proof was clear, that every caution, which prudence could suggest, was used to prevent a loss ; for the reasons upon which that rule was founded, do not, I think, exist with the same force in this country, as they did in England, from whence it is derived. Policy may however render it necessary here. Carrying for hire is the usual general description of those who fall within the rule ; and there is no class to which it will apply with more force or propriety than to those who navigate our inland waters, through which channel almost all the produce of the country is likely to find its way to a market, and therefore deserves to be well protected. But the question is not now to be adjudged. The doctrine was recognized by this Court in the case of *Everleigh vs. Sylvester*, decided some years ago, in relation to boat owners navigating our inland waters ; and in the late cases of *Rutherford vs. M'Gowen*, (*1 Nott & M'Cord* 17,) and *Cook vs. Gourdin*, (*ante* 19,) it is extended even to ferry owners.

Independent of the doctrine, I think, the verdict was right, even on the ground of negligence. It was obvious, that the boat was top heavy as soon as she was separated from the other, and the usual cautions which the defendant used to prevent accident, proved that he was conscious of danger. The loss happened by his trusting

too much to his care and skill; and reloading the boat when the cotton was dripping with water from the canal, and from which the injury actually arose, was not the exercise of that prudence which ought to excuse the defendant.

The motion is refused.

Justices *Calcock*, *Nott*, *Gantt* and *Richardson*, concurred.

Gregg, for the motion.

O'Neal, contra.



THE STATE vs. PLEASANT GORMAN.

Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*.—(a.)

TRIED before Mr. Justice *Johnson*, at Columbia, October Term, 1819.

The prisoner was tried and convicted for stealing a horse, the property of John Tidwell, under the following circumstances:—The prisoner was known in the town of Columbia, by the name of *Pleasant Gorman*, and had the care of a waggon and team, then employed there, belonging to a Mr. *Johnston*, of Chester district; and *Strother Tidwell* (the son of the prosecutor) had also under his care a waggon and team belonging to his father, which was employed at the same place. On a Saturday evening, *Strother Tidwell* applied to the prisoner to lend him a horse, to ride up into Fairfield district, to procure some fodder for his horses. He obtained the horse and went away, leaving his own team in the care of a Mr. *Gandy*. On Sunday the prisoner applied to *Gandy* to borrow one of *Tidwell's* horses, to go a few miles below Granby, as he pretended, to procure hay for his horses; and *Gandy* lent him the horse, charged to have been stolen, and he went directly off with him to Barnwell district, where he was before known, and was there recognized by the name

of *William Turnage*, and there sold the horse to a Mr. *Seigler*. In passing through the street in Columbia, he told one witness, that he had just swopped for the horse ; and he told *Seigler*, that he got him as a part of his dividend of his father's estate, who had lately died in North Carolina.

One of the witnesses stated, that he was employed by *Johnson*, of whose team the prisoner had the charge, to provide for them, and that the prisoner was under no necessity of troubling himself, on that account.

Two witnesses, on the part of the prisoner, stated, that they had known him from his infancy until within the last six or eight years, and they had not then heard any thing against his reputation ; but since that time they knew nothing of him ; and that his true name was *Pleasant Gorman*, but that he was sometimes called *Turnage*.— They never heard *William* added to it before, nor did they know why he was called *Turnage*.

Mr. Justice *Johnson* delivered the opinion of the Court.

This case has been submitted without argument, and the grounds of the motion being the general one, that the verdict is contrary to law and evidence, without any specification, we are left to conjecture on what it is predicated.

The points made in the argument of the cause before the Jury, in the Court below, and those which I presume are now relied on, were, that a larceny could in no case, be committed where the thing, charged to be stolen, came to the possession of the party charged, by delivery of the owner : And admitting it might, that the evidence in this case, did not satisfactorily show, that the prisoner's design, in obtaining possession of the horse, was at the time felonious.

Whatever might have been the old rule on the subject, there can be no question, that at this day a larceny may be committed of goods obtained by delivery from the owner, if it was done *animo furandi*, (3 Chitty Crim.

Law 923,) and the reason and propriety of this rule appear to me too manifest to need illustration. If delivery by the unsuspecting owner, was a sufficient excuse for the thief, however grossly fraudulent or felonious his intention might be, villainy would readily devise stratagems to obtain it, even from the most wary, and would be wholly destructive of that confidence and spirit of accommodation by which society is held together.

That the prisoner got possession of the horse, with the stealing of which he is charged, with a felonious intention, is determined by the verdict of guilty, and unfortunately for him, I think, it is too plainly manifested by the evidence. He obtained the possession of the horse from *Gandy*, in whose care he was left, under the strong claim that he had lent one the day preceding to *Strother Tidwell*, in whose care he was; pretending that he wanted to ride only a few miles to procure hay for the team, of which he had the charge; for which there was no necessity; as they were supplied by one of the witnesses, who was employed by the owner to provide for them. He had but just got the horse into his possession, when he set up a claim to him by telling one of the witnesses that he had swapped for him. And he carried him directly off to *Barnwell*, where he immediately disposed of him, telling the purchaser that he received him as a part of his dividend of his father's estate, who had lately died, and moreover, assumed a diversity of names, well calculated for that pursuit.

I am therefore of opinion, that the motion must be refused.

Justices *Colcock*, *Nott*, *Gantt* and *Richardson*, concurred.

Goodwyn and *A. P. Butler*, for the motion.

Stark, Solicitor, contra.

(a.)—See the case of the *King vs. Aickles*, (Leach, 266.) See also a case in 1 Haywood's Rep. 154, *State vs. Long*.

R.

ELIJAH TEAGUE *vs.* REUBEN GRIFFIN.

The declaration for a tort, should describe the property or thing affected with as much certainty as will enable the defendant to see clearly and distinctly to what he is to answer; and when that purpose is attained, the object of description will be fully answered.

In an action of trover for a negro slave, the name is not an indispensable part of the description, *ut semble*; and after verdict, the omission cannot be made a ground in arrest of judgment.

When a father, on the marriage of his daughter, permits property to go into her possession and remain a considerable time, it is sufficient evidence of a gift.—(a.)

TRIED before Mr. Justice *Johnson*, at Newberry, October Term, 1819.

This was an action of trover, brought to recover the value of a female slave. She was described in the declaration as a certain female slave, called and known by the name of ———.

The evidence in support of the action was that the plaintiff had married the defendant's daughter, and that shortly after the marriage, and about the time the plaintiff had settled on his own plantation, the negro in question was permitted by the defendant to go into his possession, where she remained about a year, and was generally regarded as the property of the plaintiff; and that at the end of that period, the plaintiff being on a visit to the defendants, when about to go away, the plaintiff asked him if the negro was to return with him, to which he answered, "*I reckon not.*" Plaintiff replied "*it is as you please;*" and he went off, and left her there.

A witness on the part of the defendant stated, that in a subsequent conversation with the plaintiff, he stated that the negro first went into his possession on the application of the defendant's wife to him, to know whether the plaintiff and his wife might carry the negro home with them; to which the defendant replied, that, "she (his wife) might do as she pleased," without stating whether it was to be considered as a gift or a loan, and that under these circumstances, he, the plaintiff, pretended no claim to her.

The case went to the Jury under a charge from the Court, on the law arising in the case, leaving the facts entirely to them ; and they found a verdict for the plaintiff, for the value of the negro.

A motion was now made in arrest of judgment on the ground :

That the negro was not described in the declaration with sufficient certainty.

And for a new trial on the ground :

That possession alone was the only proof of property in the plaintiff ; and the presumption arising therefrom, was rebutted by the circumstances of the case, and his own acknowledgments that he had no claim to her.

Mr. Justice *Johnson*, delivered the opinion of the Court.

The ground taken in arrest of judgment, involves two considerations :

1st. Whether the declaration does not describe the negro with sufficient certainty ?

2d. If it does not, whether it is not cured by the verdict ?

Every declaration for a tort, should describe the property or thing affected with as much certainty as will enable the defendant to see clearly and distinctly for what he is to answer, and when that purpose is answered, the object of description is fully attained. (*Vide 1 Chit. Plead.* 362.) In this case, it is objected that the name was omitted. The name, it is true, furnishes one fact, pointing to the identity of the negro ; but that itself, does not always render it certain, for there may be another of the same name, and a description might possibly have been given, which would have pointed at her with more certainty ; for instance, her size, age, sex, complexion, marks, parents, &c. It would therefore appear, that the name was not an indispensable part of the description ; but I think it ought not to be omitted where it was known ; and it was evidently

the intention to insert it here. I am well satisfied, however, that the objection comes too late, after a verdict.

There was no objection made at the trial of the cause, in the Court below, for the want of certainty in the description; and the cause was tried on the merits. The object of certainty was therefore attained, and the plaintiff comes too late now to complain. See 1 *Chitty*, 401, where it is laid down, that a defect, imperfection, or omission in the description of the property or thing, is cured by a verdict. In short, that the Court will presume almost any thing after a verdict.

The motion for a new trial depends upon the evidence; and it would be a sufficient answer to it, that as there was evidence on both sides, even admitting it preponderated on the side of the defendant, this Court would not interfere with the province of the Jury, by disturbing their verdict. But in this state, permitting personal property to go into the possession of a daughter on her marriage, and to remain there a considerable length of time, has long been regarded as sufficient evidence of a gift; (1 *Bay* 232,) and I think with great propriety. Where a parent is able, it is not only usual, but very natural to make some provision for their daughters on their marriage; and when this provision is inconsiderable, I venture to affirm that in ninety-nine cases out of an hundred, that the only evidence that could be furnished of a gift, is the possession of the property. The very delicate relationship which subsists between the father-in-law and the son-in-law, is a complete barrier to the latter's making any demand upon him, as to the precise terms on which property is put into his possession; and it is notorious, that these things are usually negociated through the mother, who ascertains the will of the father, in relation to it. But when this delicacy is gotten over, they never think of calling in witnesses to attest the gift when each feels himself secure in the confidence and friendship of the other. To oppose this evidence, which we deem satisfactory, are the declarations of the plaintiff. These the Jury might have dis-

credited, although the character of the witness was not assailed by proof; or they had a right to presume, that they were made when the defendant was ignorant of the rights which had vested in him by the delivery to him and his possession, and, in either view, they ought not to have been permitted to defeat his interest, if indeed, he had any.

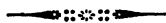
The motion, I think, ought to be discharged.

Justices *Colcock*, *Nott*, and *Gantt*, concurred.

O'Neal, for the motion.

Stark, Solicitor, contra.

(a.)—See ante, *Baker vs. Avant*, vol. 1, 218. *Banks vs. Hatton*, *Ib.* 221. *Broshears vs. Blassingame*, *Ib.* 223. *Davis vs. Davis*, *Ib.* 225. *Reid vs. Colcock*, *Ib.* 592. R.



MARY ARTHUR vs. FRIDAY ARTHUR.

A Deed may be presumed from length of time.

TRIED before Mr. Justice *Johnson*, at Granby, October Term, 1819.

This was an action of trespass, to try the title to a tract of land, part of a tract originally granted to *John Struck*, in 1734, and was usually called the *White House Tract*. *Struck* conveyed to *Henry Hartell*, who died in 1768, and by will devised the land to his widow, who, before the war of the revolution, intermarried with *William Arthur*. The defendant was one of the issue of this marriage. *William Arthur* conveyed the land to *Joseph Kershaw*, in 1777, by *lease and release*, in which his wife joined. But there was no written evidence that she ever renounced her estate or inheritance in the land, before a Judge or any other person, authorized to take the same, in the manner prescribed by the act of the legislature; and in 1810, she conveyed *all her lands*, without particularizing these, to the defendant, on the consideration of natural love and affection. So that the question was, whether, under the

circumstances, the Jury were authorized to presume that she had so renounced her estate or inheritance, as to perfect the plaintiffs? That being the only objection to her title.

The circumstances relied on to support this presumption, were these: *William Arthur*, the husband, died in 1786, and his widow remained on the adjoining tract until within a very few years, and never pretended any claim to this; and it was universally recognized in the neighbourhood, as the land of *Kershaw*. *Jesse Arthur*, one of her sons, who lived in the family, negotiated a purchase of the land from *John Kershaw*, into whose hands it had fallen, and for his uncle, *Hargrove Arthur*, in 1800, -as he believed, with the knowledge of his mother and the defendant; and no dispute about the title was then heard of. And *Hargrove Arthur*, from that time to his death, in 1817, although he did not plant it, used the timber on it, and it was known as his; and *Elisha Daniel* was put into possession by him, about 1808, who cleared and planted a few acres, and remained there two years; at whose house, both the defendant and his mother were accustomed to visit frequently, and were aware that he had contracted to purchase it.—Yet, under all this evidence of a hostile claim, the right of the defendant or his mother was never asserted, until after the death of *Hargrove Arthur*. There were some circumstances, which when connected with the general deed of the defendant from his mother, who was very old and infirm, *for all her lands, without describing these lands*, and considerable personal estate, in exclusion of her other children, and that founded two, on the consideration of love and affection, that she was not conscious of having conveyed them.

The Jury found a verdict for the plaintiff; and a motion, founded on the evidence, was made for a new trial.

Mr. Justice *Johnson* delivered the opinion of the Court.

The doctrine of presumption arising from length of time, is one which ought to be cherished so long as it is used

for the purposes of justice ; and there is none in our whole system which is better calculated to answer that purpose. In this case, the plaintiff has derived a clear and distinct title from the original grantee, with the exception of the deficiency in the deed from *William Arthur* to *Joseph Kershaw*, in which his wife, to whom the land belonged, acquiesced, by joining in the deed, but did not, so far as is positively proved, renounce her estate and inheritance in the manner pointed out by the act of the legislature ; and the question is, whether the Jury had the power, under all the circumstances, to presume that she did.

The doctrine of presumption is very ably considered in the opinion delivered by my late brother *Cheves*, in the case of *M'Ekvee vs. Hill*, decided in this Court, and reported in 2 *Const. Rep.* 424, under the name of *M'Chure vs. Hill*, in which a grant was presumed under a possession not exceeding thirty years, under circumstances which I think raised a pretty strong presumption, that there never had been a grant. And in the case of the lessee of *Alston vs. Saunders*, (1 *Bay*, 26,) a grant was also presumed from length of possession. In the case of *Tarrent vs. Terrill*, (1 *Bay*, —,) when a party stood by and saw another erect valuable improvements on his land, supposing it to be his own, the Court held he was not entitled to recover.

I am aware that the principle of this doctrine is founded on long possession, generally ; but when the possession is not the most notorious, I think it ought to be supported, when sustained by circumstances as strong as are exhibited in this case.

They are these : The defendant's mother, under whom he claims, and himself, have acquiesced in the plaintiff's title, by not pretending any claim to it for more than forty years. She had given a pledge to *Joseph Kershaw*, that she would do whatever was necessary to perfect the title by joining in the deed with her husband—in the *lease and release*. And the country has, since that period, passed

through an eventful revolution, and was for a long time in possession of the enemy, who spared nothing that could be of service to the citizen. The possession of *Hargrove Arthur* by his tenant, and his continued claim and exercise of acts of ownership over it, for the last nineteen years, and above all, the uncertainty whether the defendant's mother, by the general deed which she gave him, did intend to disturb this claim, raise an almost irresistible presumption in favor of the plaintiff.

I am therefore of opinion that the motion ought not to prevail.

Justices *Colcock*, *Nott*, *Gantt* and *Richardson*, concurred.

Egan and *Gregg*, for the motion.

Stark and *Blanding*, contra.



MARMADUKE COATS vs. DANIEL MATHEWS.

On a question of location, the course and distance of one line extended ten chains beyond a creek, and its parallel line also extended five chains beyond the creek, which creek (or river) formed a semi-circle, with the circumference turned from the centre of the tract in dispute; the plat represented the whole of the creek, in its course, as included in the tract: Upon this evidence, the Jury found a verdict to the following effect, and it was supported by the Court, viz.— That the line should be closed by running a straight line from one point to the other, until it encountered the river, and then to follow that until it arrived at where such straight line would cross the river, and then to pursue it until it arrived at the other point.

Location is a question of evidence, and cannot be reduced to fixed and definite rules.

Course and distance must yield to actual marks, whether natural or artificial; but in the absence of these, course and distance must determine the location.

TRIED before Mr. Justice *Johnson*, at Edgefield, October, 1819.

This was an action of trespass to try titles to a tract of

land, situated on Little Saluda river, on which a verdict was found for the defendant.

The case depended on the location of the defendant's grant. In the plat, annexed to the original grant, the river is represented as running in nearly a straight line within, and immediately along, the Southern boundary, which is a straight line. Upon the resurvey, all the lines on the North side of the river were found distinctly marked. Those on the South, it was evident, from the plat itself, had never been run; and were what are usually called open lines. At the point where the Western or upper line strikes the river, the corner is distant five chains on the South of the river, and where the Eastern or lower line strikes the river, ten chains South of the river is the distance to the corner; and in the original plat, the survey is closed by a straight line from those two points. But upon the resurvey it was found, that by a sudden and considerable southwardly bend of the river, a straight line from those two points would intersect the river very near them, and cut off a considerable body of valuable low grounds lying on the North side of the river; and the question was, whether this line was to be so closed, or whether the river should be regarded as the boundary from the points where it was intersected by the straight line? If the former, then the present motion for a new trial ought to prevail; but if the latter, the verdict was right. It was also contended, on the part of the defendant, that the lines crossing the river to the South should be extended as far as to include the whole bend of the river by a straight line.

Mr. Justice *Johnson* delivered the opinion of the Court.

Location is necessarily a question of evidence, and cannot therefore ever be reduced to any fixed or definite rules; and it is only by the application of general principles to it, that its weight or influence can be determined. Among those applicable to this subject, there is none perhaps better established or more generally received, than

that course and distance must yield to actual marks, whether they are natural or artificial. The reason appears to me obvious. Bad instruments and the innumerable errors which every day's experience develops, would ever render it uncertain. And it is equally clear, that, in the absence of marks, course and distance must, from necessity, determine the location.

The correctness of the verdict, in this case, will, I think, be clearly demonstrated, by the application of these principles to the facts. In the original plat, the river is represented as running almost in a direct line immediately within the southern boundary of the land. If then it be true, that course and distance must yield to marks, it follows, that you cannot run that line across the river.—But it was said in the argument, in the Court below, that the river ought not to controul the course, because it was not itself represented as the boundary. This argument accedes the position, that if it had, the course would yield, and prove, I think, rather too much ; for this strange absurdity would follow, viz.—In the event of its being called for, as an external boundary, you would be bound to pursue all its windings however ridiculous and absurd, and it is to be wholly disregarded as any evidence of location, if it be represented as running within the land.

But this case may, I think, be determined on another principle. If we are to judge from the grant and the plat annexed to it of the intention of the parties to it, if indeed the state can be supposed to have any mind upon the subject, all the land within the lines North of the river, was intended to be granted ; for it is so represented in the plat ; and no one will doubt, that the intention of the parties, collected from the grant itself, is conclusive.

I have before remarked, that course and distance must determine the location in the absence of actual marks.—This principle is, I think, applicable to the position taken on the part of the defendant, that the two lines crossing the river should be extended so far southwardly as to include the bend of the river by a straight line from their

terminations. It will be recollected, that all the lines South of the river are open lines; there is nothing then on either of these lines to carry you beyond the given distance, and it is not until you turn your course to close those two points, that you meet with any obstruction, you then encounter the river, to which, as a mark, your course must yield, and turns you aside until you arrive at your true course again.

The motion must therefore be discharged.

Justices *Colcock*, *Nott*, *Gantt*, and *Richardson*, concurred.

Stark, for the motion.

Caldwell, contra.



JOHN BEARD vs. JAMES BRANDON.

Where the defendant gave the plaintiff a note of hand, on a third person, in payment for property purchased, which note had been given for money won on a horse race, therefore void, *Held*, that the plaintiff may recover the value of the property from defendant, although the note was never presented to the maker for payment.

THIS process was brought to recover 20 dollars, being part of 32 dollars, which the defendant had agreed to pay the plaintiff, for a watch purchased of him.

The defence insisted on, was, that the plaintiff had agreed to accept, in part payment, a note of hand on two men, by the names of *Word* and *Hollis*, for 20 dollars, at his risk; and that, at all events, the defendant was not to be answerable till all legal means had been used by the plaintiff, to collect the amount from *Word* and *Hollis*.

It appeared in evidence, that the plaintiff, shortly after the contract, ascertained, that the note in question had been given for money won on a horse race, and called upon the defendant, in order, that the contract might be rescinded: This he proposed, which the defendant refused. The circumstance of the note having been given on a gambling consideration, was concealed from the plaintiff,

at the time of the contract, and the defendant, at the time of the proposed rescision by the plaintiff, admitted, that the note had been so won. It appeared from the evidence, further, that the plaintiff had demanded the money from one of the defendants, but not from the other.

When the evidence had closed, the counsel for the defendant, moved for a nonsuit, supposing that the plaintiff had not shown that he was entitled to a recovery :

1st.—Because he had not used due diligence to get the money from the drawers, *Word* and *Hollis*.

2d.—Because no fraud was alleged in the process.

3d.—Because, from the terms of the contract, the plaintiff had taken the note at his own risk.

The Presiding Judge, (Mr. Justice *Gantt*,) having decreed for the plaintiff, an appeal was made. The defendant claimed a right to a nonsuit upon the same grounds that were taken in the Court below.

Mr. Justice *Gantt* delivered the opinion of the Court.

The leading and governing circumstances in this case are—

1st.—Concealment by the defendant of a fact which ought to have been disclosed at the time of the contract.

2d.—That the note, passed to the plaintiff, was one absolutely void in law ; proved by the defendant's acknowledgment, that the same was a security taken for money won on a horse race.

3d.—The defendant's refusal to rescind the contract.

It is evident that the plaintiff would not have entered into this contract, had the defendant disclosed the nature of the security passed to him. This is inferrible from the plaintiff's desire to rescind, on the day of the contract, after having ascertained the fact, that the note was given on a horse race.

The rule which has so long prevailed, of requiring a fair disclosure of all the circumstances which might govern the determination of the contracting parties, would be strangely perverted, if it did not, upon an occasion like the present,

bear with full force upon this defendant. Why should the plaintiff have prosecuted a suit with diligence, upon a security acknowledged by the defendant to be irrecoverable at law? The attempt would have been vain and idle, and this the law does not require of any man. Of right therefore the plaintiff demanded payment of the defendant in the first instance; nor was it necessary, that he should have stated with greater precision the nature of his claim. Had there been any strength in the defence which was attempted, the same might have been specially noticed and brought to view by the plea or defence on the part of the defendant; and this would have been the regular course of procedure. The note which was passed to the plaintiff, being a nullity in itself, and the defendant having received a *bona fide* consideration for the amount called for by it, on his refusal to take it back, a personal responsibility immediately devolved upon the defendant to pay that amount to the plaintiff. Nor can the Court discover any ground on which a nonsuit could have been avoided. The defendant, by the decree is called on for the amount agreed to be given for the watch, and the security passed to the plaintiff will remain his property still. The plaintiff not having been made acquainted with its true nature, and thereby imposed upon, had a right to abandon it, as a thing of no value, and leave to the defendant who had obtained it of the drawers, the task of contravening (if it can be effected,) the provisions of the act which declares it to be void.

The Court is of opinion, that the defendant can take nothing by his motion.

Justices *Colcock*, *Nott*, *Johnson* and *Richardson*, concurred.

Thompson, for the motion.

Clarke, Solicitor, contra.

BENJAMIN MASSEY vs. ANDREW THOMPSON.

The act of 1785, for recording conveyances, embraces sheriff's, as well as other deeds: therefore a deed from the sheriff, if not recorded within six months, is void as to subsequent purchasers.

Query? Whether notice will dispense with recording?—(a.)

TRIED before Mr. Justice *Colcock*, at Lancaster, Fall Term, 1819.

This was an action of trespass to try title to a tract of land, lying in Lancaster district.

The plaintiff produced the original grant to John Barnett, and from him a regular chain of titles down to Robert Thompson, the partner of the defendant.

John Getris was introduced as a witness, who swore, that many years ago he drew a deed from Robert Thompson to Andrew Thompson, the defendant, for the land now in dispute, which deed was duly executed; that defendant has been in the constant possession of the land ever since. There were produced a judgment and execution against the defendant, at the suit of John Beaty, under which the land was sold by the sheriff, Howe, and his deed to James R. Massey, and lastly, the deed of James R. Massey, to the plaintiff. The defendant still being in possession, offered a judgment and execution in favour of John Hogan against himself, and a sale of the same land, prior to the sale under Beaty's execution, and a deed from the sheriff, Perry, to John Hogan; which deed was not recorded in the office of Mesne Conveyances, within six months from the time of its execution; also, a deed from John Hogan, to Jane Thompson, the mother of defendant, and a receipt of John Hogan, to Robert Thompson, in which it appeared, that Hogan had sold the lands to Robert Thompson. The plaintiff produced the sheriff's books, in which there was an entry, that the land had been sold as the property of Hogan, at the suit of one Hicklin, and bid off by James R. Massey, at twelve and a half cents.

On the part of the plaintiff it was contended, that he ought to recover, because the deed to Hogan, from the sheriff, Perry, was never recorded; and secondly, because the defendant could not be permitted to set up any title against the plaintiff, he being in possession, and the property having been sold as his.

On the part of the defendant, it was urged, that there was not sufficient evidence that the land was plaintiff's; and if there was, there was a clear title proven in Jane Thompson, it not being necessary, under the act, to record sheriffs' deeds.

The Court charged the Jury, that the act embraced sheriff's deeds, as well as all others; and the Jury found for the plaintiff. A new trial was now moved for on the grounds:

1st.—Because sheriffs' deeds are not embraced in the recording act, and that therefore the sheriff's unrecorded deed to Hogan, under which the defence was made, ought to have prevailed over the sheriff's recorded deed to James R. Massey, under which the plaintiff claimed.

2d.—Because, if sheriffs' deeds are within the recording act, the defence ought to have prevailed, as there was evidence which ought to have been left to the Jury, showing, that James R. Massey knew of Hogan's deed before he purchased.

Mr. Justice *Colcock* delivered the opinion of the Court.

The words of the act are, "Whereas it is necessary to settle the mode of proving and recording deeds and other conveyances in the several counties of this state, for preventing frauds, *Be it enacted*, That no conveyance of lands, tenements, or hereditaments, within this state, shall pass, alter, or change, from one person or persons, to another, any estate of inheritance, in fee simple, or any estate for life or lives, nor shall any greater or higher estate be made or take effect in any person or persons, or any use thereof, to be made by bargain or sale, lease and release, or other instrument, unless the same be made in

writing, signed, sealed and recorded in the clerk's office of the county, where the land mentioned to be passed or granted shall be, in manner following:" For persons within the state six months. For those resident in any other of the United States, twelve months. For those resident without the limits of the United States, two years.

"And if any deed or any other conveyances shall not be recorded within the respective times before mentioned, such deed or other conveyance shall be legal and valid only as to the parties themselves and their heirs; but shall be void and incapable of barring the right of persons claiming as creditors, or under subsequent purchasers, recorded in the manner herein before prescribed, &c."

(1 *Brev. Dig.* 171. *Grimke P. L.* 381-2.) It was contended, that this act did not apply to sales made by sheriffs, because such transfers were sufficiently notorious without the recording of the sheriffs' deed.

Secondly—Because, from the language of the act, it could never have been intended to embrace sheriffs' deeds. It speaks of persons without the state, which can never be the situation of a sheriff. It makes the deed valid as to the parties, and a sheriff is not to be considered as a party to his deed; for if so, the deed might be void as to the persons whose property was sold, if not recorded within six months, yet binding on the sheriff, which could never have been intended.

The act, I think, embraces sheriffs' deeds as well as others. The words are certainly sufficiently comprehensive to embrace them. Indeed, from the meaning which must necessarily be attached to them, it must embrace such deeds. No conveyance of lands, tenements, or hereditaments to be made by bargain or sale, lease or release, or other instrument, without any exceptions, certainly must comprehend a conveyance from a sheriff; and it surely can be no objection to this, to say, that the act speaks of persons residing without the state, and even of those without the United States; for an act may require conveyances of lands, within the state, made by those who

reside without the state, to be recorded in the district where the land lies, and such a requisition is not inconsistent with a similar requisition as to those who live within the state. The act intended to provide for the case of all persons conveying land lying within the state, whether they were resident within the state or not. Nor can I see any objection to the sheriff's being embraced in the word "parties." He certainly is a party to the deed which he makes, and I can see no inconvenience from the deed's being considered as valid between him and a purchaser, when it was not recorded. The object of the act was to prevent frauds, and to protect creditors and subsequent purchasers. Perhaps he and the debtor would both be considered as parties, he as the agent of the debtor, and neither of them would be permitted to take the advantage of the want of recording. Be that as it may, the law is clear, that as to subsequent purchasers, the deed of the sheriff or any other person, not recorded within six months, is *void*. Much reliance was placed on the argument predicated on the publicity and notoriety of sheriff sales. But the very case before us shows the fallacy of such reason. Here is an instance of a sale by a sheriff, and no conveyance to the person to whom it was knocked off. And this frequently happens—a purchaser fails to comply with his contract, a resale is made, one who is the highest bidder transfers his bid, and the title is made to the person to whom the right is transferred. These sales are not more public than sales by a vendue master, in a large and populous city, nor indeed are they more so in the country than many sales by other auctioneers.

As to the second ground, it cannot be supported, either by the facts or the law.

The only fact relied on to prove that James R. Massey knew of the sale to Hogan, is the entry in the sheriff's books; and that is by no means conclusive, for two reasons already mentioned. But if he had known of the sale, that does not satisfy the law; the object of it was to give notice to all, and thereby prevent fraud. For which pur-

pose the deed is declared to be void as to subsequent purchasers, if not recorded. I am aware of the high authority against this position; but I shall ever think it nothing short of legislation to dispense with the positive enactments of the law on this subject. What does it tend to? First, it is to be determined in point of fact, that notice is given. Secondly, what shall be evidence of notice? And here we are launched into a sea of uncertainty. One says the deed must be seen; for a man is not bound to believe every report which he may hear. Another determines, that if he is put upon the enquiry, it is sufficient, at least to go to the Jury, and then, by departing from the clear and positive requisitions of the law, doubt and uncertainty are engendered. But if notice be deemed an equivalent for recording, it certainly should be notice of an actual, legal and *bona fide* transfer. And this appears to be the better opinion of those who contend that notice is adequate to recording. On this occasion, it was not even pretended, however, that the plaintiff had any notice. And it is said to be a settled rule, that if one effected with notice, sells to one without notice, the latter will be protected equally as if no notice had ever existed. (*Bebee vs. Bank of N. York*, 1 *John. Rep.* 573-4. *Ferrars vs. Cherry*, 2 *Vern.* 384. *Jackson vs. Given, et al.* 8 *John.* 141. 2 *Fonb.* 153. *Mertins vs. Jolliffe et al.* *Amb.* 313.)

But it is further contended, on the part of the plaintiff, that if it be not necessary to record the plaintiff's deed, or if notice to the plaintiff were clearly proven, yet, that he should recover upon the principle, that the defendant is estopped by his deed. As a general rule, I would say, that where the interest of one in possession has been fairly sold by the authority of the law, he should not be suffered to gainsay the title of the purchaser. An unfortunate debtor will struggle to the last, and would at all times (showing the title deeds in his possession) be able to show a title in another. I think, therefore, both from policy and the analogies of the law, he ought not to be permitted to oppose the title of a purchaser. The sheriff's

deed is his. He has received the consideration. It has been applied to the payment of his debts. He should be estopped. No more should he be permitted to oppose the recovery of the plaintiff, than if he had signed the conveyance with his own hand, or had become the tenant of the plaintiff.

The motion is discharged.

Nott J.

Whether notice will dispense with the necessity of recording, I give no opinion, but taking into consideration, all the circumstances of the case, I concur in the conclusion.

Justices *Gantt* and *Johnson* concurred with Mr. Justice *Nott*.

Richardson J.

I do not concur also in the decision that a sheriff's release need be recorded, but I do concur in the opinion otherwise.

Miller, for the motion.

Williams, contra.

(*a.*)—In the case of *Tait vs. Crawford*, Columbia, May, 1821, the Court *Held*, that the records were not the only notice of a conveyance; but that any notice to a subsequent purchaser, so it be distinct, is sufficient.

R.



ANTHONY LEACH, and others, *vs.* JAMES V. THOMAS.

Neither of the attachment acts has prescribed the form in which bonds shall be given, previous to the issuing of the writ; and any will do, so that the condition be such, that the plaintiff can be made to respond in damages to the defendant, in case of any illegal conduct on his part.

TRIED before Mr. Justice *Colcock*, Union, Fall Term, 1819.

This was a motion to quash three attachments, issued

against the defendant, on the ground, that, being foreign attachments, the condition of the bonds should have been, that the plaintiff should be answerable for all damages which the defendant may sustain by any illegal conduct in obtaining the said attachment, (and not as they are, to pay all costs in case they be cast in the suits, or discontinued,) and also to be answerable for "all damages which shall be recovered against the said plaintiffs;" which latter words are those prescribed in the act for issuing domestic attachments.

The motion was refused, and a motion was now made to reverse that decision.

Mr. Justice *Colcock* delivered the opinion of the Court.

Neither of the acts prescribes any particular form in which the bond shall be taken. But the legislature conceiving this mode of proceeding might subject defendants to vexation and injury, by unjust plaintiffs, it was thought proper to secure their rights by requiring those, who should resort to this remedy, to give bond in double the amount of the sum to be attached, (1 *Brev.* 39. *P. L.* 367-8,) or for which the attachment shall issue, to make good any injury which may result from issuing such attachment. We are then only to determine whether the conditions of these bonds, are such, that in case of any illegal conduct, the plaintiff might be made to respond in damages to the defendant. Upon an attentive examination of the words used in the two acts, I think it will appear that they are, in substance, the same. But if there be the slightest difference, the words used in the conditions of these bonds, which are the words used in the act authorizing the issuing of domestic attachments, are somewhat more comprehensive; and I cannot conceive that it would be proper to permit the defendant to quash the attachment, because the plaintiff had given him more ample security than the law required.

The act authorizing the issuing of foreign attachments is

in these words : " No writ of attachment shall issue before the plaintiff has given bond to the defendant in double the amount for which the attachment issues, to be taken by and lodged with the clerk of the district, to be answerable for all damages which the defendant may sustain by any *illegal* conduct in *obtaining* said attachment." (1 *Brev.* 41.) That which relates to domestic attachments is as follows : " That every justice of the peace, before granting such attachment, shall take bond and security of the party for whom the said attachment shall be issued, in double the sum to be attached, payable to the defendant, for satisfying and paying all costs that shall be awarded to the defendant, in case the plaintiff suing out the attachment therein mentioned, shall discontinue or be cast in his suit, and also all damages which shall be recovered against the said plaintiff, for his suing out such attachment, which bond shall be by the same justice returned to the Court, to which the attachment is returnable, and the party entitled to such costs and damages may bring suit and recover, &c. (1 *Brev.* 39.)

The condition of the bond, in foreign attachments, is, that the plaintiff shall be answerable to the defendant for all damages which he may sustain by any *illegal* conduct in *obtaining* said attachment. That of the bond in domestic attachments, is, to be amenable for all costs which may be awarded, and also for all damages which shall be recovered against the plaintiff, for his *suing* out such *attachment*. Now damages cannot be recovered for suing out the attachment. The act then means for illegally suing it out. And the conditions here used, then, contain all that is required by the act for issuing foreign attachments, with an addition of the word costs, which would follow as a matter of course, the recovery of damages, and may therefore be considered as mere surplusage.

The motion is rejected.

Justices *Nott*, *Gantt*, *Johnson*, and *Richardson*, concurred.

LEWIS HOGG vs. A. KELLER, et al.

The law does not require the master of a slave to state in a *pass* to what place the slave shall go. It is sufficient if it express a leave of absence for a particular time.

TRIED before Mr. Justice *Richardson*, at Newberry, March Term, 1819.

This was an action to recover damages for unlawfully whipping the plaintiff's negro. It was proven that the defendant *Keller*, styling himself captain of a patrol, and the other defendants acting under his authority, did whip the plaintiff's negro, who had a pass from his master. The number of stripes was not many, nor were they severely laid on. The defendant attempted to justify, under the patrol law; and on the ground that the pass was not according to law; because it did not state to what place the negro was going. One of the witnesses said, each one gave some stripes, and that this was the usual mode of whipping by patrols.

The Presiding Judge charged the Jury, that the case was already made out, and that the only question was, what should be the amount of damages.

The Jury thought proper to find a verdict for the defendant; and a motion was now made for a new trial, on the ground, that the verdict was wholly contrary to law, and without any evidence whatever, on the part of the defendant.

Mr. Justice *Colcock* delivered the opinion of the Court.

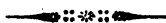
The law does not require a master to state in every pass, to what place the negro shall be permitted to go. It is sufficient if it express a leave of absence, for such a time. (*See 2 Brev. 231. Grimke's P. L. 164.*) The defendants therefore, were guilty of a trespass on the plaintiff's property, and he is entitled to a verdict. It is highly proper to protect these officers, when acting within the

limits of their authority ; but nothing is so offensive to the law, as to violate the principles of justice and humanity, under the semblance of its authority. Shall it be considered a justification that these defendants thought the ticket an unlawful one? Shall ignorance of that law under which they were acting, and from which they derived their authority, excuse them? This would be a violation of all law, and place the slaves of the country at the mercy of every unprincipled and unfeeling man, who may be clothed with this brief authority.

It is the duty as well as the interest of every master to protect his slave from unnecessary punishment, and to resist the abuse of legal authority. However small, therefore, the injury to the slave, the plaintiff should recover as much damages as would carry costs. But I think it highly questionable, whether in this case, the captain of this patrol was not actuated by some improper motive. Could he have passed over that clause in the act, which authorizes masters to permit their slaves to go abroad with tickets, and read one in the same act, which authorizes him to punish a slave that has no ticket? It is by no means probable. Nor am I satisfied with the evidence offered, to prove that they were a patrol. It is a temporary appointment, and therefore, I conceive should be proven by the captain of the beat, who has detailed them for that service.

Justices *Nott* and *Johnson*, concurred.

Justices *Gantt* and *Richardson*, dissented.



JOHN ALLEN vs. SAMUEL HALL, et al.

Marriage is a fact to be left to the Jury.—(a.)

In a question whether there has been a marriage, proof that two persons have lived together, as man and wife, will be conclusive, if not rebutted; but, like all other presumptive evidence, may be rebutted by circumstances or positive proof.—(b.)

The declarations of either husband or wife, as to the marriage, are admissible.

TRIED before Mr. Justice Gantt, at Chester, Spring Term, 1819.

This was a summons in partition, for the division of 240 acres of land. *John Hall*, the ancestor of the defendant, died intestate, leaving the defendant, his children and *Margaret Hall*, said to be his wife. He conveyed her right to the plaintiff, who brought this suit, to recover one third thereof. The plaintiff produced a deed from one *Wm. Brown*, to *John Hall*, and another from *Margaret Hall*, to himself. The defendants pleaded :

1st. *Ne unques seisie.*

2d. *Ne unques accouple,*

3d. *Statute of Limitations.*

It appeared that *John Hall* had lived with *Margaret* for several years, before his death, and by some, supposed to be married. A Mr. *M'Kown*, who was the administrator, and who had paid to Mrs. *Hall*, her portion of the personal estate, was called to prove, that she, (*Margaret*,) was the wife of *John Hall*. He was objected to, because it was his interest to support the marriage, least he should be liable over to the heirs for having improperly paid to her the portion of the personal estate. But this objection was overruled.

The defendant then offered to prove the declarations of *Hall*, to show that he *was not married to Margaret Hall*, and also the declarations of a *magistrate*, who it was said, was the person who married them, if they ever were married. But the Presiding Judge rejected this evidence, as being incompetent.

On the plea of the Statute of Limitations, it was proven, that the defendants had been in peaceable possession of the land ever since the death of their ancestor, which was ten or eleven years ago ; and that the widow left the state shortly after his death.

On the part of the plaintiff, it was contended, that the

possession of the defendants, was his possession ; and that there could be no adverse possession of an undivided estate.

The Jury found a verdict for the plaintiff, for one third of the land in dispute ; and a motion was now made for a nonsuit.

Because the plaintiff produced no grant, nor chain of title to *John Hall*.

And for a new trial.

1st. Because the marriage was not sufficiently proven.

2d. Because the Court refused the declarations of *John Hall*, denying his marriage with *Margaret*.

3d. Because the Court rejected the declarations of the magistrate.

4th. Because the Jury found contrary to the charge of the Judge, that the possession of defendants was sufficient to bar the plaintiff.

5th. Because the Court received the evidence of *Mr. M'Kown*, which was incompetent.

Mr. Justice *Colcock* delivered the opinion of the Court.

It is unnecessary to take notice of any other than the second ground, as the Court concur with the Presiding Judge on all the others.

In a question whether there has been a marriage, proof that the parties lived together, as man and wife, if not rebutted, will be conclusive. But this evidence is only presumptive, and like many other presumptions, may be rebutted by circumstances or positive proof. Where persons live together, as man and wife, their declarations are for the most part given in evidence, and if these declarations be contradictory, it will of course create doubt, and must be left to the Jury to determine. As to creditors and *inter vivos*, it is said the testimony ought not to be admitted. But as to the rights of either husband or wife, or their children, they are admissible. It does not follow, because such declarations were made, that they should be conclusive. The time, place, manner

and an infinity of other circumstances, will have their weight in determining the degree of credit which will be given to them. Perhaps they would be particularly liable to suspicion, when made by a man who had lived with a woman, as his wife, for a number of years. There can be no danger in admitting such testimony. It would never be required, except in cases of doubt. There can be no interest in the parties from whom the evidence must come. Nor indeed any bias of the mind, which would be calculated to lead to error. For where the interest of either the husband or wife is concerned, it must be the declarations of the one, who is no more, which are to be given in evidence; and they would not therefore be liable to suspicion, as it can scarcely be believed that such declarations would be made with a view to destroy rights, which can only exist after the person making them shall be dead, and where the rights of children are concerned. The security is, that no one, however base, is disposed to render himself more so by false assertions. But who could complain of the admission of such testimony? Surely not the woman who has placed herself in a suspicious situation. She could easily have prevented this by pursuing a virtuous and honorable course. And this may be urged as an additional reason for the admission of the testimony, that it will tend to repress vice. In the case of *Goodright Ex. dim. Stevens vs. Moss, and others*, ejectment, for two messuages, (*Cowper*, 593,) two questions arose:

1st. Whether the father and mother could have been examined, if alive?

2d. Whether their declarations after their death, can be admitted as evidence? *Howarth & Jones*, showed cause, and insisted that the testimony of parents in their lifetime, or their declarations after their decease, might be admissible, in cases where proof of the marriage was presumptive only, as by cohabitation or general reputation. Lord *Mansfield* decided in this case, that the declarations of the mother were admissible, and a new trial was granted. In

the *King vs. Inhabitants of Bramley*, (6 *Dun. & East*, 330,) the wife was offered, to prove she was never married, and the declarations of both husband and wife to the same purpose. The Court below rejected the evidence. Lord *Kenyon*, stopping the counsel for the motion, said "This evidence was certainly admissible, though the Justices at the sessions were to judge of the effect of it. In the case of the *King vs. The Inhabitants of St. Peters*, it was expressly held, that the supposed husband was a competent witness, to disprove the marriage. There are also many other cases of this kind, but in all of them such testimony is open to great observation." (See *Mace vs. Cadell*, *Cowper*, 232. *Phillipps*, 176-7.)

The motion is therefore granted.

Justices *Nott*, *Johnson* and *Richardson*, concurred,

Pearson and *Clendinen*, for the motion,
Williams, contra.

(a.)—See *Cockrill vs. Calhoun*, 1 *Nott & M'Cord's Rep.* 285.

(b.)—See *Fenton vs. Reed*, 4 *John. Rep.* 54.

R.



THE STATE vs. FRANCIS HATTAWAY.

To constitute perjury it is necessary, that the oath relate to some matter material to the question in issue.

It is not necessary, that the particular fact sworn to should be immediately material to the issue; but it must have such a direct and immediate connection with a material fact, as to give weight to the testimony to that point.—(a.)

Where a particular fact was material in the case, and the witness swore to the fact, and said, that he was present when it took place; and he was asked where he lived at the time, and he answered, near the parties, and it was proved, that he did not live in the state at the time, it was held, that it was not swearing to such a material fact, as would constitute perjury, though false.

THE defendant had been indicted and convicted of perjury. The circumstances of the case were as follows:

Shackleford was indicted for stealing a cow. On that indictment he was acquitted, or the prosecution terminated in some other manner, which gave him an opportunity of bringing an action, for a malicious prosecution, against Smith, the prosecutor. In that action, it became material for Shackleford to show, that he had purchased the cow, in question, of one Carter. That fact he proved by this defendant, Hattaway. He swore, he was present when Shackleford made the purchase. He was asked, where he lived at the time. He said, he lived near Carter's, perhaps within a few hundred yards of him. It afterwards appeared, that he did not live near Carter's, at the time. Indeed it appeared, that he did not live in the state, until sometime after this transaction was said to have taken place.

The perjury assigned was, that he swore, he lived in the immediate vicinity of Carter, when in fact he did not live there.

The cause was tried before Mr. Justice *Nott*, at Marion court house, Fall Term, 1818, who instructed the Jury, that the words, laid in the indictment, were not of such materiality as to constitute the crime of perjury. They however took a different view of the question, and found the defendant guilty.

This was a motion to set aside that verdict and to grant a new trial, on the ground, that the verdict was contrary to law.

Mr. Justice *Nott* delivered the opinion of the Court.

It seems to be agreed by all the writers on criminal law, that one ingredient in the crime of perjury, is that the oath relate to some matter material to the question in issue. (*4 Black. Com.* 137-8. *Rex vs. Aylett*, 1 T. R. 69.) There can be no doubt, but that an extra-judicial oath, or one relating to a matter utterly immaterial, or even an impious oath, taken in idle conversation, may be as offensive in the eye of heaven, as the most solemn oath taken in a Court of justice. But there are many offences, against

morality and religion, which are not cognizable in Courts of justice. For such offence, a man is answerable only to his God, and not to the laws of his country. And our duty is to determine what the law considers a public offence, and not to declare what ought to be so considered.

There is no offence, the general character of which, is better understood than that of perjury; and no point better settled, perhaps, than that the oath must relate to some fact material to the issue. When I say it must relate to some fact material to the issue, I do not mean, that the particular fact sworn to must be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point. As where it became material to identify a flock of sheep, and a witness was asked, how he knew the sheep in question to belong to a particular individual, he said, because they were in his mark. Now although they were not in his mark, and although the mark was immaterial, yet as that was the medium through which the witness arrived at his knowledge of the important question, it had a direct tendency to strengthen his testimony, and was therefore material. So in the present case, if the defendant's situation had given him a better opportunity of becoming acquainted with the material point in the case, testimony to that fact, might have been considered material. Thus if the question had been, whether Carter had made a good crop that year, or whether his overseer had done his duty, his testimony to those points might have been strengthened by the fact of having lived near him; because it furnished him with the means of knowing, with more certainty, the truth of those facts. But it is not so with the case now under consideration. The material fact was whether Carter actually sold the cow to Shackelford. If the defendant lived a hundred miles off, and was present at the sale, he was a competent witness to prove it. If he lived within fifty yards, and was not present, he could know nothing of the matter. It was not a fact of such a nature

as to be better known to him, in consequence of the contiguity of his residence. It may sometimes be difficult to determine how far the evidence of a particular fact may go to strengthen the testimony of a witness, to a more material point in a case; and perhaps no precise and definite rule can be laid down on the subject. In all cases therefore so highly penal, where the question is of a doubtful character, I should incline to favor the side of the accused. In the case now under consideration, I cannot conceive, that the testimony was either directly or indirectly material to the issue. I am of opinion therefore, that a new trial ought to be granted.

There were several other grounds taken in the case which it is unnecessary to consider.

Justices *Colcock*, *Johnson*, *Richardson*, and *Gantt*, concurred.

R. A. Taylor, for the motion.

Evans, contra.

(a.)—See 2 Chitty's Crim. Law 305-6. *King vs. Gripe*, 1 Comyn's Rep. 43. S. C. 2 Salk. 514; also in 1 Lord Raymond 256.

It was decided in *O'Mealy vs. Newell*, (8 East's Rep. 364,) "That any person making, or knowingly using, a false affidavit taken abroad, (though a perjury could not be assigned on it here) in order to mislead our own courts, and to pervert public justice, is punishable by indictment as for a misdemeanor." R.



THE STATE vs. VINES DAYLEY.

Where a person, against whom a bill of indictment has been found for a forcible entry, traverses the force, a writ of restitution will not be granted, till the question of force be tried: but the defendant will not, as a matter of course, be allowed a term, as in other misdemeanors.

THIS was an indictment for a forcible entry. A bill of indictment had been found against the defendant, who had traversed the force, and was allowed until the succeeding term to try the question. A motion was then made,

on the part of the state, for a writ of restitution, to put the prosecutor again into possession. That motion was made before Mr. Justice *Richardson*, at Newberry, March Term, 1819. The Presiding Judge, being of opinion, that a writ of restitution ought not to be awarded, until the traverse was tried, refused the motion. A motion was now made to reverse that decision and to grant the writ of restitution.

Mr. Justice *Nott* delivered the opinion of the Court.

By several statutes of England, made of force in this state, a justice of the peace, upon complaint made to him, that any person or persons have forcibly entered upon his lands and tenements, and turned him out, and still keeps the possession, is authorized to repair to the place where the force is said to be committed, and there to make enquiry into the matter; and if he find the charge to be true, he may issue a writ of restitution to remove the intruder, and to restore the person, thus forcibly expelled, to his possession again. (*Bacon For. Ent.*) But if the defendant tender a traverse of the force, no restitution ought to be allowed, until such traverse be tried. And the justice or justices, before whom the indictment is found, are required to issue a *venire* immediately, and impanel a Jury to try the question. (*Do. Do. G.*) And if the writ of restitution is improperly granted, this Court, like the Court of King's bench in England, will grant a writ of restitution to the defendant: As where the indictment is quashed for insufficiency, or where the justices refuse to try the traverse of force, &c. But I can find no case where the Court, which is to try the traverse, has granted a writ of restitution, until the question of force has been determined.

The question, so far as regards the present case, is quite immaterial, because the traverse has been tried, and the defendant convicted. But it is important as it regards the future practice of the Court. The object of the law is to give to a person, who has been unjustly and forcibly

deprived of his possession, prompt and adequate redress, by restoring him again to that possession. It will not however suffer the relative situation of the parties to be changed, without giving the accused an opportunity of being heard in his defence. If therefore a person, against whom a bill of indictment is found, traverses the force, the writ of restitution shall not be awarded, until that question is tried. But then it must be done without delay. The defendant is not entitled to the indulgence of a term, as is usually allowed in other cases of misdemeanor. Such delay would go to deprive an injured party of that speedy justice which it was the intention of the statutes to afford. The traverse must be tried the term at which the indictment is found, unless such cause is shown to the Court as will authorize them to refuse the writ of restitution, until the succeeding term.

The object of this application having been already obtained, the motion may be discharged.

Justices *Colcock*, *Gantt*, *Johnson*, and *Richardson*, concurred.

O'Neal, for the motion.

Stark, Solicitor, contra.



LAURENS SIMS vs. RICHARD TARRANT, Sheriff, &c.

Where a sheriff neglects to take bail, according to the exigency of the writ, he is not entitled to the benefit of the act allowing the common bail an exemption from liability until a return of *non est inventus* on a *Ca. Sa.* against the principal.

THIS was an action on the case, within the summary jurisdiction of the Court, tried before Mr. Justice *Richardson*, at Pendleton, Fall Term, 1819, against the sheriff, for not taking bail. The facts of the case were as follows :

The plaintiff, *Sims*, had sued two defendants on two notes ; and on his process was endorsed an order for bail, founded on an affidavit in the customary legal form. The

sheriff's return stated, that he had served the process personally on one defendant, by delivering him a copy, and had left a copy for the other. The plaintiff in that action obtained a judgment against both defendants, and thereupon issued a *Fieri Facias*. Without any other proceedings in the original action, he commenced this process against the sheriff for neglect of duty in not taking bail.

The Court held, that the sheriff, not having taken bail, became himself bail, and was entitled to all the privileges of bail to the sheriff; one of which privileges being an exemption from process until a *Ca. Sa.* should be issued and returned. The plaintiff was nonsuited. He therefore now moved the Constitutional Court to set aside this nonsuit, and for a new trial, on the ground :—That the sheriff, in not taking bail, was a wrong doer and neglected his duty, and is not entitled to the privileges of bail.

Mr. Justice *Richardson* delivered the opinion of the Court.

The opinion of the Court is, that the sheriff is not entitled to the privileges of bail. The rule, which applies to this case, is a general one, that where a ministerial officer is required to do an act, and neglects to perform it, whereby an injury comes to any person, the individual injured has a right of action against the negligent officer. In this case, the sheriff, having omitted to take the defendant or require bail, though he may afterwards take the body before the return of the writ, and perhaps enter bail to the action even now; (See *Allingham vs. Flower*, 2 Bos. & Pul. 246. *Pariente vs. Plumbtree*, lb. 35.) yet, until doing so, he cannot have the privileges of bail, but is liable to the plaintiff's action, which is immediately consequent upon the neglect.

The motion is therefore granted.

Justices *Colcock*, *Nott*, *Johnson*, and *Gantt*, concurred,

A. Bowie, for the motion.

Whitfield, contra.

BENJAMIN BOYD vs. JOHN BOYD.

No attachment shall be issued, until a bond has been given for double the amount for which it issues.

Giving a blank paper, with the plaintiff's name signed thereto, is not a sufficient compliance with the attachment acts; and an attachment obtained thereon will be quashed on motion.

THIS was a case tried before Mr. Justice *Gantt*, at the Spring Term of 1819, for Fairfield district.

After the plaintiff had gone through with his evidence, the counsel for the defendant, moved to quash the proceedings, on the ground that no bond had been given by the plaintiff in the attachment, according to the act of assembly.

It appeared that the Clerk had filed a half sheet of paper, to which was annexed the name of the plaintiff, and another, but otherwise blank. On the back of this paper was the following indorsement, "*Benjamin Boyd vs. John Boyd.—Bond on Attachment.*"

The Presiding Judge, being of opinion that the attachment in this case, had irregularly issued, sustained the motion to quash the proceedings. From which decision the plaintiff appealed, and contended, that the proceedings were sufficiently regular, and that the attachment ought to have been supported.

Mr. Justice *Gantt* delivered the opinion of the Court.

By the act of 1799, the necessity of petitioning a Judge, for leave to issue an attachment, is done away, and they are made demandable of common right, subject however to this proviso, which immediately follows; "Provided always, that no writ of attachment shall issue, before the plaintiff has given bond to the defendant, in double the amount for which the attachment issues, to be taken by and lodged with the clerk of the district, to be answerable for all damages which the defendant may sustain by any illegal conduct in obtaining said attachment." (1 *Brev.* 41.)

The case, therefore, resolves itself into this proposition : Was this a bond ?

A bond is defined to be a deed or obligatory instrument, in writing, whereby one doth bind himself to another, to pay a sum of money, or do some other act. It contains an obligation, with a penalty, and a condition, which expressly mentions what money is to be paid, or other thing to be performed, and the limited time for the performance thereof ; for which the obligation is peremptorily binding. The ceremonies necessary to a bond or obligation, consist of *writing* on paper or parchment, *sealing* and *delivery*. Signing hath been held not to be necessary. (2 Co. 5, a. *Noy's Max.* 54. 2 Salk. 462. 5 Mod. 281.) And Lord Coke says, that though sealing and delivery be essential in an obligation, yet, there is no occasion in the bond to mention that it was sealed and delivered, because he says, these are things which are done afterwards. (*Goddard's case*, 2 Co. 5, a.) Hence, there can be no doubt, but that the obligation, with a penalty, and the condition underwritten, must precede the sealing and delivery. The case before us, is the reverse of Lord Coke's doctrine, and if established, would go to show, that there may be a bond without writing. In 4th Comyns's Dig. Obliga. B. 3. referring for support to an authority highly prized, *Perk. S.* 188, the law on this point is express, and thus laid down :

"If a blank be signed and sealed, and afterwards written, it is no deed." Surely then, this cannot be considered a good bond, where there is no writing at all.

Now the act of assembly is express, that no attachment shall issue before the plaintiff has given bond in double the amount for which the attachment issues.

Where do we find a fulfilment of what the act requires upon this paper ? The remedy by attachment is one which must be strictly pursued ; nor have the Court power to dispense with any of those pre-requisites prescribed by the act.

The Court are of opinion, that the decision below was correct and legal, and that the plaintiff can take nothing by his motion.

Justices *Colcock*, *Nott*, *Richardson*, and *Johnson*, concurred.

A. W. Thompson, for the motion.

Clarke, Solicitor, contra.

WILLIAM H. BOWEN vs. PRESLEY DOGGETT.

A. was indebted to B. \$ 50, for so much money won at cards, and B. was indebted to C. \$ 25, for goods sold and delivered to him, previous to that time. B. offered to give A. a discharge from his debt, upon condition he would become paymaster to C. for the debt which he owed him, and procure a discharge for the same. C. accepted the note of A. and gave B. discharge. *Held*, that the note was good.—(a.)

THIS was a Summary Process, brought upon a note for \$ 25. Defence thereto, a gambling consideration.

The plaintiff was called on by the defendant to give testimony in the case, and he testified that one Murdock Ochiltree, was indebted to him for property sold, in the sum of \$ 25. That in a conversation between Ochiltree and the defendant, in the presence of the plaintiff, it appeared that the former had, at some antecedent period, won of the latter at cards, \$ 50, and in pursuance of an understanding between Ochiltree and defendant, it was proposed to the plaintiff to take defendant for the debt, which Ochiltree owed him. He consented to do so, and defendant gave the note in question for the amount of Ochiltree's account, on which Ochiltree was discharged. He further testified that he was not concerned in the act of gaming with those persons, and that the consideration for which the note was given, was for property which he had sold to Ochiltree.

Mr. Justice *Gantt*, who tried the case, gave a decree for the plaintiff, for the amount of the note, with interest and costs. From which the defendant appealed, and con-

tended that the decree should be reversed, upon the ground that the consideration, upon which the note was given, was for money won at cards, and therefore void.

The opinion of the Court was delivered by Mr. Justice Gantt.

It is assumed that the consideration for which the note was given, was illegal, and the note void in its inception. All securities taken for money won at cards are void by the act of assembly. But was this note given to secure the payment of money thus won? The positive testimony of the plaintiff shows clearly that it was not. Had the defendant secured to Ochiltree the amount won, by a note, there can be no question but the same would have been void and irrecoverable, as well in the hands of Ochiltree, as that of an innocent indorsee, for valuable consideration, and without notice. The contamination which attended on it in its inception accompanies it in all the stages of its existence; and the law frowns upon, and considers it in the light of a *felo de se*, whenever, and wherever it makes its appearance. But should the drawer, after the note has been transferred, substitute another security in place of it; this is regarded with an eye of favour, and it will avail the holder. The case of *Cuthbert vs. Haley*, (8th Term Rep. 390,) confirms the truth of this position. There A. for an usurious consideration, gave his note to B. who transferred it to C. for a valuable consideration, without notice of the note being usurious. And afterwards A. gave C. a bond for the amount. It was holden, in an action brought upon the bond, that the bond could not be avoided, on the ground of the usurious contract between A. and B.

In principle, the case of *Bowen and Doggett*, is the same with the one quoted. Nor does the circumstance of a bond having been given in the one, alter the principle; for in the case of *Paxton vs. Popham*, (9th East, 421-2,) Lord *Ellenborough* says, that an obligor is not restrained from pleading any matter which shows that the bond was

given upon an illegal consideration, whether consistent or not with the condition of the bond. The note in question is freed from any taint which might impeach its validity; and the consideration for which it was given being for property sold, makes it good, and available in law. The circumstance of a conversation between Ochiltree and Doggett, in presence of the plaintiff, in relation to a previous gambling transaction between them, and one in which the plaintiff had no agency or concern, cannot alter the merits of his case. Their illegal conduct cannot be considered as restrictive of any right on the part of the plaintiff to accept a security for the payment of a just and *bona fide* debt; and the courtesy of the law would go too far, were it to allow a gambler to interpose his antecedent illegal conduct, as a shield to screen him from the payment of a security given for a valuable and *bona fide* consideration. Considerations of public policy, and a due regard to morals and decency, have given rise to the principle, that the Courts are not to take cognizance of, and support contracts founded on gaming considerations; but was never intended to protect a gambler from the payment of a just debt founded on a valuable consideration.

The Court are of opinion that the decree below was correct, and that it must stand.

Justices Colcock, Nott, Johnson and Richardson, concurred.

Witherspoon, for the motion.

Levy, contra.

(a.)—Vide *Stewart vs. Eden*, 2 Caine's Rep. 150. *Jackson vs. Henry*, 10 John. Rep. 185. B.

JOHN HAVIS vs. THOMAS TRAPP.

JOSEPH GRISHAM vs. MISHACK DEALE.

Where attachments had issued, under the 4th and 6th Clauses of the Act of 1785, the Court will not quash the attachments on affidavits, showing, that, at the time the attachments were obtained and levied, the defendants were within reach of the ordinary process of law, and could have been arrested.

THESE were two attachments, one returnable to Kershaw district court, the other to Abbeville district court.

The plaintiff in the first case made oath before a justice of the quorum, that the defendant was justly indebted to him in the sum of fifteen dollars and seventy-five cents; and that he was *privately removing out of the district, or so absconded and concealed himself that the ordinary process of law could not be served upon him*, whereupon the attachment issued and was levied upon the goods and chattels of the defendant.

Levy for defendant moved to quash the attachment, on an affidavit made by the deputy sheriff, that at the time the attachment was obtained, and also when the same was levied upon the goods of the defendant, he was within the reach of the ordinary process of law, and could have been arrested. Other affidavits tending to show the same facts were offered, but not read; in as much as the Presiding Judge, Mr. Justice Gantt, overruled their sufficiency in law to set aside the attachment. An appeal was made, and the defendant contended for a reversal of the decision below, on the following grounds:

1st.—Because the Presiding Judge mistook the law, in supposing the attachment could not be set aside, when it clearly appeared, that the party was within the reach of the ordinary process of law.

2d.—Because the attachment laws were only intended as a remedy in those cases where the party was remediless by the ordinary process of law; and that whenever it clearly appears, that the ordinary process of law will avail

the party, an attachment issued in such case, should be set aside.

In the last mentioned case of *Grisham & Deale*, an appeal was also made from a decision made by Mr. Justice *Richardson*, at Abbeville, on the last Western circuit, when a similar motion to quash a writ was made, and was sustained by the Presiding Judge. In this case, the oath of the plaintiff was *that the defendant intended to remove his effects, &c.*

Mr. Justice *Gantt* delivered the opinion of the Court.

The principle of law involved in the consideration of those cases being the same, it will supersede the necessity of separate opinions.

The clause in the act of 1785, under which the first mentioned attachment was taken out, is in the following words: "It shall be lawful for any justice of the peace, upon complaint to him made upon oath, by any person, that his debtor is removing out of the county privately, or absconds and conceals himself, so that the ordinary process of law cannot be served upon him, to grant an attachment against the estate of such debtor," &c. (1 *Brevard* 39. *Grimke's P. L.* 367-8.) The latter attachment was taken out under another clause of the act which declares that, "It shall be lawful for any creditor to go before any justice of the peace for the county where his debtor resides, and make oath how much is justly due to him, and that he hath just grounds to suspect and verily believe that such debtor intends to remove his effects; and thereupon such justice shall issue an attachment against the estate of such debtor, &c." (1 *Brev.* 40. *P. L.* 368.) A proviso in the act common to both is this: "*Provided always*, That all attachments shall be repleviable by appearance, and putting in special bail, if by the Court ruled so to do, or by giving bond with good security to the sheriff or other officer serving the same, which bond the sheriff or other officer is hereby empowered and required to take, to appear at the Court to which such attachment shall be

returnable, and to abide by and perform the order, and judgment of such Court." (1 *Brev.* 39.) In both cases it is the oath of the plaintiff which entitles him to the remedy by attachment. A remedy prescribed by the act in question, and which in every case depends entirely upon the convictions which rest upon the mind of the plaintiff himself. It is a facile but coercive remedy given to plaintiffs to compel the appearance of debtors in Court; and however harsh the remedy may appear, yet having the sanction of the law on its side, it is not in the power of a Court to dispense with its efficacy.

The defendant is permitted to supersede the attachment by pursuing the mode prescribed by the act; and this may be effected with the same ease and convenience, as the putting in of bail, in a case where it is required. If the oath has been false and corrupt, the party guilty of it may be indicted for perjury. If conscientiously and honestly taken, there is no power in the Court to set the attachment aside by motion. And the defendant for any illegality of proceeding has his remedy upon the bond which the act enjoins to be given by the plaintiff.

An attachment can only be considered in the light of a suit or action at law, and like all other legal remedies, its want of propriety or efficacy must be made to appear in a regular course of pleading. A short hand method of quashing, by motion, a remedy given by law would place in the hands of the Court a dangerous power; the exercise of which would be as odious to the community as it would be troublesome to the Judge. Let it be once established, that the defendant may quash the attachment which has been issued, by the adduction of affidavits before a Judge, and the influence of the principle would be attended with the worst of consequences. Oaths upon oaths taken in the heat of passion and effervescence of the moment, would soon become the order of the day; and perjuries innumerable would probably grow out of the indulgence. But considered in the light of an action at law, why is it to be contradistinguished from all other remedies for the redress

of injuries? It is not pretended, that the Court have a power in these to try the merits of the case upon motion: And the reason holds equally strong in the remedy by attachment, why the Court should not interfere, and cut up by the roots a remedy which the wisdom of the legislature has prescribed; one convenient in its nature, and where special care has been taken, that the party pursuing it shall place the defendant upon a footing of security, as to any injurious consequence which may result from any illegality in the proceeding. With these views of the subject, the Court adjudge, that the decision made in the case of *Havis vs. Trapp*, was legal and proper, and the motion to reverse it is refused. In the case of *Grisham vs. Deale*, the decision is reversed, and the case ordered to be restored to the docket for a legal hearing.

Justices *Colcock*, *Nott*, *Richardson*, and *Johnson*, concurred.

Bowie and *Levy*, for the motion.

M'Duffie and *Earle*, contra.



DAVID MILES vs. NEAL M'LELLAN.

Forbearance to sue for a certain time, is a sufficient consideration for a new promise by the debtor, and for the nonperformance of which assumpsit may be maintained.—(a.)

When money has been paid for forbearance, it cannot be recovered back by the party paying, nor be the legal subject of a discount.

THIS was a summary process, tried at Marion, Fall Term, 1819, to recover the sum of fifty dollars, due by note. The hand writing of defendant was proved.—Defence usury; and a discount.

The following facts were proven on the trial, viz.—That at the time the note was given, it was agreed between the parties, that the plaintiff should lend the defendant the sum called for by the note, and that for the use of the money from March, the date of the note, to October

following, the plaintiff was to have the use of a horse belonging to the defendant, to work his crop. That the horse was worth from seventy to eighty dollars, and was a good work horse : That the price given for work horses of this description was from four to five dollars per month. It was further shown, that the note remained unpaid some time after the horse was returned ; and that, in the spring ensuing, the defendant, to prevent being pressed, agreed to pay, for forbearance merely, the sum of ten dollars, which exceeded the legal rate of interest.

Upon this evidence, it was insisted for the defendant, that the case was brought within the statute against usury : That the value of the horse, for the time he was used by the plaintiff, far exceeded the legal rate of interest on the sum loaned ; and the money paid for forbearance was also relied upon as proof that the plaintiff had acted usuriously.

It was further insisted, that, admitting the evidence did not bring the case within the statute against usury, still the defendant was entitled to a discount from the note, on account of the services of the horse, and the money paid.

Mr. Justice *Gantt*, who presided, decreed for the plaintiff on both points, and the defendant appealed on the following grounds :

1st.—That the contract was usurious in the beginning, in as much as it was shown by the defendant, that the plaintiff was to be allowed the services of a horse, which was worth more than the interest of the money.

2d.—That the contract was in other respects usurious, and the note, on which the action was brought, was void in law, in as much as the plaintiff received from the defendant ten dollars, exclusively for further indulgence.

3d.—That if the contract was not usurious, a discount ought to have been allowed for the services of the horse and the sum paid.

4th.—That the decree was in other respects against law and evidence.

The opinion of the Court was delivered by Mr. Justice *Gantt*.

On the first ground taken in the brief respecting the use of the horse, it is to be observed, that there was some evidence in the trial below, which went to show, that the defendant was scarce of corn at the time, the article itself difficult to be procured, and at a high rate. Under such circumstances the taking of the horse, by the plaintiff, to be fed throughout the summer, for his work, might have been a convenience to the defendant himself. At any rate it left the case very doubtful, whether the accruing interest on the note and the support of the horse, at such a time, might not be considered as the value of his services.

On the second ground in the brief, there can be no question but that forbearance to sue for a certain time is a sufficient consideration for a new promise by the debtor, and for the nonperformance of which an action of *assumpsit* may be maintained. Where money is paid down, as in this case, for forbearance, it would follow, that, as the consideration is good in law, it could not be recovered back by the party paying it, or be the subject of a legal discount. There are cases indeed, which go to show, that, to constitute forbearance a good consideration such forbearance must be for a reasonable time; (*1 Roll. Abr.* 34,) and that forbearance for a little time, (*1 Roll. Abr.* 23,) or some time, is not sufficient. As the ten dollars taken in this case, exceeded considerably the rate of legal interest for the time of forbearance, the not falling strictly within the meaning of the words "a little or some time" it was with reluctance, that the Presiding Judge felt himself restricted in the exercise of a feeling which would have led him, but for the principles of law, to discount from the amount of the note, the excess of interest.

The third ground in relation to the services of the horse, has been commented upon in the observations made upon the first; and the fourth, and the last is too general to admit of comment.

The Court are of opinion, that the decree below was legal, and that the defendant can take nothing by his motion; in which opinion the Court are unanimous.

Justices *Colcock*, *Johnson*, *Richardson*, and *Nott*, concurred.

Mayrant, for the motion.

Ervin, contra.

(*a.*)—See *Elting vs. Vanderlyn*, 4 John. Rep. 237.

R.



HUGH DAVITT *vs.* HARDY COUNSEL.

Where a *Fi. Fa.* had been issued against the principal, to which there was a return of *nulla bona*, and an action commenced thereupon, against the bail, on the bail bond, he is entitled to the whole term, after the service of the writ on him, to surrender his principal.

THIS was a motion, on the part of Samuel E. Kenner, to be discharged from his liability, as bail, for the defendant in this case. The plaintiff had obtained judgment against the defendant, at March Term, 1819, in an action, wherein Samuel E. Kenner was bail. An execution, against the property of defendant, was issued, and returned that nothing was to be found. A *Ca. Sa.* was subsequently issued, upon which the sheriff returned that the defendant was not to be found in his district. Whereupon the plaintiff procured the bail bond to be regularly assigned to himself, and commenced his action of debt upon it, against Samuel E. Kenner, the bail. During the sitting of the Court, at the first term, the defendant, Counsel, appearing, Mr. Kenner, the bail, made his motion, and the Presiding Judge granted an order, that the sheriff of the district do take the defendant into custody, in discharge of the said Samuel E. Kenner, the bail.

The plaintiff now moved to rescind the order on the grounds:

1st. Because, upon the return of the *Ca. Sa.* the de-

defendant was not to be found, whereby the bail became fixed and liable for the judgment of the plaintiff.

2d. Because the plaintiff had proceeded to recover the judgment by an action of debt upon the bail bond, before the bail had made his motion to be discharged.

Mr. Justice *Richardson* delivered the opinion of the Court.

There is no doubt, that upon the return of *non est inventus*, upon the *Ca. Sa.* against the defendant, the bail becomes liable. But it is the settled privilege of bail to surrender his principal on or before the return of the writ, which notifies him that he is to be holden responsible. (1 *Wils.* 270. *Larden vs. Bassage.* 2 *H. Black.* 594.) It is immaterial whether the bail be sued by *Sci. Fa.* or writ in debt. The question is, has the bail been notified? If so, he must hasten to surrender his principal, or become finally fixed and liable upon his bail bond or recognizance of special bail, as the case may be. But what is the last moment after suit against the bail, at which he may surrender his principal? Strictly speaking, the bail is fixed by the return of the *Ca. Sa.*; yet, they have been always indulged with the right of surrendering the principal, even after such return. The English practice is to allow a few days within the first term, in the Common Pleas, and in the King's Bench, the whole term. (2 *Schwyn* 56. 8 *Modern Reports* 341. *Simmonds vs. Middleton*, 1 *Wils.* 270. *Bailey vs. Smeathman*, 4 *Burr.* 2134. *Man- nin vs. Partridge*, 14 *East*, 600.) Our practice has not limited the surrender to a time short of the whole term; and we deem the first term after service of the writ upon the bail, the usual, convenient and reasonable time, within which the surrender must be made. The term affords a convenient opportunity to make the surrender. It gives the bail some time to search for his principal, and the plaintiff is put to no additional expense; for he cannot proceed upon the writ till after the first term. It is understood in this case, that the *Fi. Fa.* and *Ca. Sa.* were

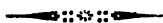
taken out successively during the same vacation, whereby a temporary and perhaps nominal search was made after both the goods and person of the principal. Now, though it is clear that the plaintiff may so change his executions, yet, I apprehend that the bail is entitled to have a whole vacation for the search to be made. The undertaking of bail to the action, is, that the principal will pay the condemnation money, or surrender his body; and in default of both, he will himself discharge the claim, and bail to the sheriff is now on the same footing. The failure of the principal to pay, or surrender, is vested by the executions issued. But to take them out, or either of them for a moment only, would be a mockery. No actual search could be made. I apprehend, then, that the execution must have remained with the sheriff throughout the vacation, *i. e.* from the test to the return, before the bail becomes fixed. But this is not essential to the decision of this case.

The motion is refused.

Justices *Colcock*, *Nott*, *Gantt*, and *Johnson*, concurred.

Bauskett, for the motion.

Stark, contra.



JOHN GAMBLING vs. EDWARD PRINCE.

A license to enter cannot be given in evidence under the general issue, in trespass *quare clausum fregit*, but must be pleaded.

An action of trespass, *quare clausum fregit*, can be maintained for a trespass upon an uncultivated and uninclosed part of an entire tract of land, of which the plaintiff is in actual possession, though not of the part trespassed on; and even without any written evidence of title.

In such an action, title does not necessarily come in question.

THIS was an action of trespass *quare clausum fregit*, tried at Union Court-House, Spring term, 1819, before Mr. Justice *Gantt*.

The plaintiff proved that he resided on the land in question, and that the trespass consisted in cutting trees on an

uninclosed and uncultivated part of the land, some distance from his house. The witness, who proved the trespass, said he knew that it was within the plaintiff's lines, because he was present when the land was surveyed. When the testimony on the part of the plaintiff was closed, the defendant moved for a nonsuit, on the ground, that the plaintiff proved no actual possession of the part trespassed on, nor any evidence of written title. But the Court overruled the motion.

The defendant then offered parol evidence of a license from the plaintiff to cut the trees. The evidence was objected to, on the ground, that a license should be specially pleaded, and could not be given in evidence under the general issue. That objection was overruled, and the defendant obtained a verdict.

A motion was now made by the plaintiff for a new trial, on the ground, that the evidence of license ought not to have been admitted under the general issue. And on the part of the defendant, the same ground was relied on that was taken for a nonsuit in the Court below.

Mr. Justice *Nott* delivered the opinion of the Court.

There are two questions submitted to the consideration of the Court in this case.

1st. Whether a person can maintain an action of trespass *quare clausum fregit*, for a trespass committed on an uncultivated and uninclosed part of an entire tract of land, of a part of which the plaintiff is in actual possession, (though not of the part trespassed on,) without some written evidence of title?

2d. Whether evidence of license can be given in evidence under the general issue?

In an action of trespass, *quare clausum fregit*, the title of the land does not necessarily come in question. Possession alone will enable a person to maintain an action. (*Harker, et al. vs. Birkbeck, et al.* 3 Burr. 1556.) And for that purpose an actual possession of part is a constructive possession of the whole. And parol evidence of the

fact as well as the extent of plaintiff's possession is admissible, without any written evidence of title. The defendant may put the plaintiff upon the proof of title, if he choose to do so, or he may set up a title in himself. (3 *Black. Com.* 214. *Reeve's Eng. Law*, 342.) But without denying the plaintiff's title, or setting up one in himself, parol evidence is sufficient to establish the plaintiff's right of action.

The second question is not more difficult to determine. Under the plea of not guilty, a defendant cannot give in evidence a license from the plaintiff. (*Phillipps*, 129.) In the case of *Bennett vs. Allcott*, Mr. Justice Buller, says, "it is now perfectly clear, that a license to enter, cannot be given in evidence under the general issue." (2 *D. & E.* 168.) And if the law is perfectly clear, we are under no obligation to give reasons for it. There are many well established principles of law, for which it would be difficult to give good reasons at this day. But in this case, the reason is obvious. It is that the plaintiff shall not be surprised by a defence of which he had no notice, and of which he could not be apprised by the defendant's plea. It would be much more difficult, I think, to give a reason why *liberum tenementum*, should be given in evidence under the general issue, than why a license should not. That is a practice to which I could never give my assent, unless compelled by the force of authority.—That a person should be permitted to give in evidence in an action on the case for a nuisance, any thing which goes to show that the plaintiff had no cause of action, is consistent with the general rules of practice. An action on the case is a liberal action, in which a greater latitude in declaring is allowed to the plaintiff, than is allowed in other cases. And a correspondent indulgence must be given to the defendant. He is permitted therefore to give any thing in evidence which goes to show that the plaintiff has no cause of action.

And I am not disposed to withhold from the plaintiff a new trial, merely because it appears probable that the

plaintiff will recover only nominal damages. I think there are but few cases where such a ground ought to prevail in favour of a verdict which is acknowledged to be contrary to law. And in this case, the opinion is drawn from the testimony of the defendant, which was improperly admitted, and when the plaintiff in all probability, was unprepared to rebut it.

Neither do I think the evidence ought to have been admitted in mitigation of damages. Such a practice would go to defeat the rule of law which requires it to be specially pleaded, and which I think is founded on correct principles, and ought to be supported. (*Argent vs. Durant*, 8 D. & E. 405.)

I am of opinion a new trial ought to be granted.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

M Kibbin, for the motion.

A. W. Thompson, contra.



JOSEPH HAWKINS *et al.* vs. REUBEN S. LEWIS.

The Court, in its discretion, may give leave to one of several plaintiffs to discontinue, where it appears, he has no interest in the cause.

AT the Spring Term of 1819, for Union district, *Gist*, for plaintiffs, moved for leave to amend the declaration in the above case, by striking out the name of one of the plaintiffs, inserted, as was alleged, by mistake.

Mr. Justice *Colcock*, who presided, refused the motion; and application was now made to reverse the decision below, and that leave be given to amend.

Mr. Justice *Gantt* delivered the opinion of the Court.

It is every days practice for a plaintiff to obtain leave to discontinue, as to one or more of the defendants, in an action; and the reason applies with equal force where it becomes proper to strike out the name of a plaintiff. In 2 *Sellon* 337, it is said that a plaintiff may enter a *nol. pros.*

as to part of the cause of action, as also to some of the defendants. Now as a plaintiff may enter a *nol. pros.* either as to the whole action or as to part of the action, or to some of the defendants, (*lb.*) does it not seem to follow that where several are made plaintiffs, it is competent for one to discontinue, if he choose, so far as he may be concerned? If one of several plaintiffs ascertain, that he has no interest in the subject matter of the suit, he may, I think, of common right, discontinue as to himself; otherwise he might be subjected to the expense of a suit, that could profit him nothing; and if withdrawing the name of one of the plaintiffs does not vary the issue, nor alter the nature of the right to be tried, I can see no possible inconvenience which can result from the allowance.

In 2 *Sellon* 335, it is laid down, that "a plaintiff may discontinue, as a matter of course, any time before verdict or judgment on demurrer." And what should hinder one of several plaintiffs, all claiming in the same right, from discontinuing, as to himself, when he ascertains, that the entire interest appertains to the other plaintiffs, and that he has nothing to gain by the further prosecution of the suit? If he cannot, thus situated, discontinue, as a matter of course, it is surely competent for the Court to grant him leave, seeing it alters not the nature of the case to be tried, nor places either the remaining plaintiffs or the defendant, in a different or worse situation.

In referring to authorities, I find, that amendments have been allowed even in matter of substance. As in *Wilcocks vs. Huggins*, (2 *Strange*, 907,) plaintiff declared, as executor, on a promise to the testator, and the statute of limitations was pleaded, and issue joined. The plaintiff, on motion, was permitted to amend, by laying the promise as made to himself, on payment of costs, and liberty to defendant to plead *de novo*.

By striking out *prochein amy*, plaintiff having attained full age. (*Barnes Notes* 18.)

In 1 *Comyn's Digest* 465, "if the amendments are very long, yet if not matter of new title, and inserted in the

rule, declaration may be amended, though not withdrawn, to declare *de novo*."

In 2 *Burrows* 756, it is said that, upon application to the Court by motion, or to a Judge at his chambers, by summons, the proceedings may always be amended, let them be in what stage they may, and whether in matter of form or substance, whilst they are in paper; but this is done upon equitable terms, so that the other side may not be prejudiced; as paying costs, not delaying the adverse party, giving him time to plead *de novo*, which is generally two days after amendment made, or as the nature of the case may require, and the like. (*Salk.* 47. 1 *Wil.* 7, 26, 223. 3 *Salk.* 31. 1 *Salk.* 517.)

Upon the whole, it appears to me to be a question of practice merely, which depends upon the discretion of the Court; and so to be exercised as not to prejudice the parties litigant. The striking out the name of this plaintiff neither varies the nature of the action nor requires any alteration in the pleadings. The remaining plaintiffs will derive no benefit, nor the defendant sustain a disadvantage from the permission being granted. Under these circumstances, I entertain no doubt but it is competent for the Court to direct the amendment to be made; and therefore think, that the decision below should be reversed, and that the amendment, asked for, be allowed to be made; and this is the opinion of the Court.

Justices *Nott*, *Johnson*, and *Richardson*, concurred.

Mr. Justice *Colcock* dissented.

Clendinen, for the motion.

Gist, contra.



JOHN THOMAS vs. ALLEN DEGRAFFENREID.

It is a necessary allegation, in a declaration for malicious prosecution, that the prosecution is at an end, and must be proven as laid.

And the indictment showing that the grand jury had rejected the bill will not support the allegation, that the party had been *acquitted*.

The word *acquitted* means technically an acquittal on a trial by the *petit* jury.

The declaration must always state how the case was disposed of.

Query? Whether the grand jury, finding *no bill* is such an end of the prosecution as is necessary to support this action; for another bill may be given out, unless the party be discharged from the Court upon motion.—(a.)

THIS was an action for a malicious prosecution, tried before Mr. Justice *Nott*, at Winnsborough, August, 1819. The declaration, after setting forth the prosecution in the usual form, went on to state, "That the said John Thomas was in due course of law *acquitted* of the said premises, &c. whereupon the Judges of the said state, considered and adjudged, that the said John should depart thence without day, in that behalf. And the said John was and is duly discharged of and from the premises, in the said indictment specified, as by the records and proceedings appears."

In support of the allegation in the declaration, that the defendant had been acquitted, his counsel produced a copy of the indictment on which it appeared, that the grand jury had returned "no bill."

The counsel for the defendant moved for a nonsuit, on the ground, that the evidence did not support the declaration.

The Presiding Judge, being of that opinion, ordered a nonsuit.

This was a motion to reverse that order, and to reinstate the cause.

Mr. Justice *Nott* delivered the opinion of the Court.

It is essential to an action, for a malicious prosecution, to show, that the prosecution is at an end. (2 *Selwyn* 1060.) It is a necessary allegation to be laid in the declaration, and must be proved as laid; otherwise a person might recover in the action, and still be afterwards convicted on the original prosecution. (*Doug.* 215. *Fisher vs. Bristow et al.*) The word *acquitted* is a word of technical import, and must be understood in its technical sense; to wit: an acquittal on trial by a jury. (*Morgan and*

Hughes, 2 D. & E. 225. *Jones vs. Givin*, *Gilbert's Cases* 198. *Smith vs. Cranshaw*, *Ib.* 179. 10 *Mod.* 216.) The indictment therefore showing, that the grand jury had rejected the bill, did not prove the allegation in the declaration, that he had been acquitted. It is not to be understood, that an action, for a malicious prosecution, will not lie unless the party has been acquitted by a jury on trial. On the contrary, a person may have his action after a bill rejected by the grand jury, or even where no bill has been preferred, if there is a final end of the prosecution and the party discharged. (*Cro. Jac.* 490, *Payn vs. Porter*. 2 *Selvyn* 1054.) But in such case, he must state the manner of his discharge and acquittal, which need not be done where he has been acquitted by a jury on trial. In such case the words *acquietatus fuit* are sufficient. (1 *Com.* 230.) The action for malicious prosecution is a substitute for the old action, for a conspiracy. And the grounds of both actions are the same. The only difference is, that to maintain an action for conspiracy there must be two defendants. (2 *Espinasse Dig.* 531.) Much of the doctrine on this subject, therefore, will be found under the head of Action on the case for Conspiracy. And under that head, *Comyns* lays it down, that a declaration for a conspiracy in an appeal where he was nonsuited must show *quod per considerationem curiæ quietus recessit*; for if it be, that he was acquitted, it is bad, for it shall be intended an acquittal by the country. (1 *Com. Dig.* 230.) In *Fitzherbert's Natura Brevium*, the same doctrine is laid down, and the form of the writ given. "The form of the writ of conspiracy" this author observes "where he is acquitted by verdict, doth vary in words in the end, from the writ of conspiracy, which is founded upon plaintiff's nonsuit in appeal; for one writ founded upon the verdict is, Until according to law, &c. he was acquitted; and the other writ of conspiracy founded upon the plaintiff's nonsuit, is, Until the same complainant, by consideration of our Court, departed acquitted thereof." (*Fitzherbert* 115, 116.) And in the next page, he gives

a case directly in point. ‘If the principal and one who is accessory be indicted of felony and be taken and arrested, and the principal be indicted, and acquitted, now by that the accessory is discharged, and the accessory thereupon shall have a writ of conspiracy against those who conspired to indict him, and the writ in the end shall say, *Quousque idem* (the principal) *secund, leg, &c. acquietat, fuisset et idem* (the accessory) *quietus recessit.*” Mr. Justice Buller says, “if it had been alleged, that he was discharged by the grand jury’s not finding the bill, that would have shown a legal end to the prosecution.” (*Morgan & Hughes*, 2 D. & E. 232.) But I doubt very much, whether that *dictum* is true, to the extent which it would imply. The rejection of a bill by the grand jury has never been held, in this state, as the legal end of a prosecution, unless the party has been regularly discharged thereupon by order of the Court. Another bill may be preferred. The form of the precedents which are frequently the best evidence of the law, goes to support this position. (2 Chitty 250, 254.) The declaration in the case before us, after stating, that the party was acquitted, proceeds to state further, viz. “Whereupon the judges of the said state considered and adjudged that the said John should depart hence without day in that behalf, and the said John was and is duly discharged, &c.” The mere production of an indictment with the finding of the grand jury upon it, does not therefore prove the prosecution to be at an end. It may still be going against him. It is however unimportant in this case.

The declaration was wrong, or the proof insufficient; in either case the nonsuit was properly ordered.

The motion therefore must be refused.

Justices Colcock, Gantt, Johnson, and Richardson, concurred.

Glendinen and Blanding, for the motion.

Gunning and Williams, contra.

(a.)—See *ante*. vol. 1, State vs. Smith 13. Smith vs. Shackelford 36.

R.

JOHN STURGINEGER, *et al.* vs. A. HANNAH, *et al.*

Where a husband died, leaving a widow and children, and the widow took possession of his property as administratrix, and before partition, she married and died, though her second husband be in possession of the property as administrator in right of his wife; yet it is not such a possession of his wife's choses in action as to vest in him the one third coming to his wife; but he will be entitled to the one third of her third.

And though he administer upon his wifes estate, and obtain possession, yet, he will be compelled to make partition.

THIS was a petition for the distribution of the estate of John Tobler, deceased, before Mr. Justice *Colcock*, at Edgefield, Fall Term, 1818.

John Tobler died intestate, leaving a wife and several children. His widow administered on his estate, and possessed herself of his goods and effects. She afterwards intermarried with Alexander Hannah, who, as administrator, in right of his wife, also became possessed of the effects of her deceased husband. And before any distribution had taken place, his wife died. A writ of distribution was then granted, and the commissioners assigned to A. Hannah, one third part of the personal estate of John Tobler, being the share to which his deceased wife would have been entitled, if the distribution had taken place during her life. And the question was, whether he was entitled to a third part of the estate of Tobler, or only a third part of his wife's share?

The Presiding Judge was of opinion that he was entitled to only a third part of the share which his wife would have been entitled to, and ordered the property to be distributed accordingly.

This was a motion to reverse that decision.

The opinion of the Court was belivered by Mr. Justice *Nott*.

The opinion of the Court below was in conformity with the decisions heretofore made in this Court. The case of *John Spights vs. John Holloway, administrator of J. Meggs, (a.)* was, in all its circumstances similar to the case

now under consideration. Two questions were submitted to the Court in that case.

1st. Whether the possession of the plaintiff, as administrator in right of his wife, of the personal property of Meggs, although no partition or distribution had been made, was not such a possession as to vest the share to which his wife would have been entitled, absolutely in him?

2d. Whether, if it did not, he was entitled to administration on his wife's estate, and having thus acquired possession, whether he would be required to make distribution?

The Court was of opinion, that the wife had no right which ever vested in possession.—That her interest was merely a chose in action, which never vested in the husband. That he therefore was entitled only to come in under the act of 1791, and claim one third of his wife's one third.

2d. That before the act of 1791, under the statute 22d and 23d Car. 2, and 29 Car. 2, the husband had a right to administer on his wife's estate, and could not be compelled to make distribution. But that this right had been taken away by that act, and that the husband and wife were placed upon the same footing, both as to the real and personal estate.

Similar decisions have been made by the Court of Equity, (*see 3 Eq. Rep. 144, Administrator of Mary Byrne vs. Administratrix of Thomas Stewart. Do. 160, Guardian of Eliza M. B. Elms vs. A. Hughes. Do. 289, Administrators of Bunch vs. Administrator of Hurst.*) And it is a matter of no little importance, that we preserve an uniformity of decisions between the two Courts.

I not only feel bound by these decisions, but am very well satisfied with the construction which has been given to the act of 1791. The old law which subjected both the person and property of the wife to the absolute dominion of the husband; which even permitted him *flagellis et fustibus acriter verberare uxorem*, was the offspring of a

rude and barbarous age. The progress of civilization has tended to ameliorate the condition of women, and allow even to wives, something like personal identity. I never could see any good reason why they should not retain all their interest in personal as well as real estate. I am sensible of the mischiefs which might result from a divided empire. But the right of property is not necessarily connected with the right of sovereignty. I am disposed therefore to protect and preserve the rights of the wife, as far as we can consistent with the rules of law and the decisions of our Courts, provided we do not invade the prerogatives of the husband.

I am of opinion that the decision in this case ought to be supported, and that the motion should be discharged.

Justices *Colcock*, *Gantt*, *Johnson* and *Richardson*, concurred.

M' Duffie, for the motion.

Glascok, contra.

(a.)—2 Judge Brevard's MS. Rep. 238.

R.



JAMES HOOD vs. DAVID ARCHER *et al.*

Plaintiff's wife, with others, was entitled, under the act for the distribution of intestate's estates, to a share of real estate; and a writ of partition, under the Act of Assembly, was sued out, and an order for the sale of the property was obtained, and the purchase money paid into the hands of the sheriff, according to the order: The wife then died. It was held that this was not such a reduction into possession by the husband of the wife's Choses, as to consummate his right to the whole; but as his wife died without issue, he was entitled under the act to one half.—(a.)

MOTION to reverse the decision of the Court below.

This was an application by James Hood for an order of Court, directing the sheriff to pay over certain monies to him which he had received, under the following circumstances:

William Archer died intestate, seized and possessed of

a tract of land, and leaving several children, of whom the wife of this petitioner was one. After his death, application was made by Elizabeth Archer, another daughter, for a writ of distribution, pursuant to the act of 1791. The commissioners appointed to divide the land, returned, that it could not be divided without manifest injury to some of the parties concerned; and therefore recommended, that it should be sold. A sale was accordingly ordered, upon a credit, the money to be paid by instalments, and the bonds for the purchase money to be given to the sheriff. After the first instalment became due and the money paid into the hands of the sheriff, the wife of James Hood died. And this was an application by him to have the share of the money which belonged to his wife, paid over to him. The question was, whether the payment of the money to the sheriff was such a reduction of it to possession as to consummate the right of the husband, and therefore entitle him to the whole, or whether he was entitled to only one half under the act of 1791, his wife having died without issue?

The motion was made before Mr. Justice *Nott*, at Camden, Fall Term, 1818, who refused to grant it, and who now delivered the opinion of the Court.

This question may be considered as settled in the case of *John Sturgineger et al. vs. A. Hannah et al.* in which the opinion of the Court has just been delivered. The husband could not be considered as having the possession as long as the money remained subject to the control of the Court. A Court of Equity in all probability, under similar circumstances, would order the money to be settled upon the wife, which could not be done, if the right of the husband had been consummated by possession. Perhaps it is not altogether an unimportant consideration, that the money in this case was the proceeds of land belonging to the wife. Previous to the act of 1791, the husband had only an usufructuary interest in the real estate of the wife; during her life, except where he

became a tenant by curtesy ; and there is nothing in that act, from whence it can be inferred, that it was the intention of the legislature to alter their relative rights in that respect, except, that he is entitled to a part of the inheritance after her death. The act does indeed direct, that the land shall be sold where it cannot be conveniently divided. And as this Court cannot order a settlement, the money must be paid over to the husband. The consequence is, that the land by a legal operation is converted into money and the interest of the wife in her patrimony destroyed. The effect of that provision I am constrained to believe was not foreseen at the time it was enacted, and furnishes an additional reason why the marital rights of the husband should not be extended by construction.

The motion must be discharged.

Justices *Colcock*, *Gantt*, *Johnson*, and *Richardson*, concurred.

Levy, for the motion.

Blanding, contra.

(a.)—See the case *ante* of *Sturgineger vs. Hannah*, and the following case from Judge Brevard's MS. Reports, 2d vol. 236 :

The Ordinary *vs.* GEIGER *et ux. et al.*

THIS was an action on a bond given with a condition well and truly to administer the estate of Jacob Geiger, deceased, tried before Mr. Justice *Wilds*, at Orangeburgh, April, 1805.

The defendants set out the condition and pleaded performance.—Plaintiff replied and stated a breach in not returning a true inventory. The case as it turned out in evidence was this: The mother of Dorothy, the defendant, Geiger's wife, while sole, made and executed a deed of gift of certain negroes to her four Children, jointly. Afterwards Dorothy intermarried with Jacob Geiger, the intestate, her former husband. Upon this event, one of the negroes given as aforesaid, was sent with her upon her going to live apart from her mother, and remained with her ever since. No regular partition however was ever made of the property, between the donees. After the death of Jacob Geiger, who died intestate, the defendants administered on his estate, and in the inventory of his estate, returned to the Ordinary, made no mention of the negroes given as aforesaid.

Mr. Justice *Wilds* charged the Jury, that this omission was a breach of the condition of the Administration Bond, and the Jury found for the plaintiff.

The motion in this Court was for a new trial, for a misdirection of the Judge on that point.

Egan, for the defendants, argued *totis viribus*, that the deed of gift conveyed no right of possession to the donees, but only a chose in action, and that no property vested absolutely by virtue thereof in Dorothy, while she was covert of her first husband, and consequently, that none could vest in her said first husband, and therefore that his representatives were not entitled to take any notice in the inventory of his estate of the said negroes; and that the interest of Dorothy therein, was only a chose in action, which survived to her. *Hynes vs. Errors. Lewis, Taylor's Rep.* 44. *Blount vs. Bestland*, 5 Ves. Jun. 515. 2 *Haywood* 183, 184.

Stark, contra, was stopped by the Court.

The Court, (*Grimke, Waties, Bay and Brevard*,) were all clear, that a right of possession vested instantly upon the execution of the deed of gift, and that Dorothy was entitled to the property given as a joint-tenant; and therefore that, upon her intermarriage with Jacob Geiger, the property and right of possession, which she had, vested in Jacob Geiger and became part of his personal estate, and ought to have been returned as such in the inventory: And that the direction given to the Jury by the District Court was right.

A new trial was consequently refused.

Note—In general a gift is accompanied with the immediate delivery of possession; but it is not always done, nor is it necessary. It requires some slight evidence of a delivery, in the case of a parol gift, (see 2 *Str.* 955; *Bac. Abr. Tit. Trov. sec. C.*) but not where there is written evidence of the gift, for there a delivery must be presumed. Where a merchant beyond sea consigns goods to a merchant in London, on account of the latter, and draws bills on him for such goods, though the money is not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and they become liable to his debts. 2 *Woodes* 410. 3 *P. Wms.* 411. The marriage is an absolute gift of the wife's chattles personal in her own right. (*Co. Litt.* 351, 46.) If chattles are given to a wife, the interest vests in the husband, though he has not possession of them before the death of the wife. (2 *Com. Dig.* 82, 84.)

Query? Whether it would have varied this case; if it had been proven, that the right of the donees to the negroes given, was disputed; and that the possession of them was withheld? For any thing that appeared, the possession passed to the donees; and the possession of one was the possession of all the joint-tenants. But *Query?* Did the undivided part of Dorothy vest in possession of her husband, by the marriage? If the possession was vested in her, it is to be considered as

vesting in her husband by the marriage. In the case of *Speight vs. Meigs*, the distributory share of the wife was considered as vesting only in interest and not in possession. This circumstance distinguishes that case from this. If it vested in possession in Dorothy, it vested in possession (constructively) in the husband. (*Co. Litt.* 351. 2 *Bl. Com.* 397. 2 *Com. Dig.* 84. 2 *Haywood* 184, 185. 1 *H. Bl.* 535.



WILLIAM DUNCAN, *et ux.* vs. JOSHUA BELL, *et al.*

The doctrine of implied warranties, relates as well to sales at auction, of Executors and Administrators, and others, acting in a representative capacity, as at other sales by individuals. But the Executor or Administrator is not liable himself, unless for misrepresentations: The estate alone is liable.

Where an action is brought on a note, and the defendant gives in evidence, that the property, for which it was given, was defective, it is not necessary that he should prove that he offered to return the property, or that it was impracticable. That is only necessary where general *indebitatus assumpsit*, for money had and received, is brought for a total failure on a warranty, expressed or implied.—(a.)

A. sold a horse to B. and B. to C. A. is a competent witness in an action between B. and C. as to the soundness of the horse, though the law implies a warranty of soundness on all sales, where a full price is given.—(b.)

THIS was a summary process, on a promissory note, given to plaintiff's wife, as administratrix of James Coit, for a horse bought at the sale of the estate of the said James Coit, made pursuant to an order of the Court of Ordinary. The cause was tried at Lancaster, Spring Term, 1819, before Mr. Justice Gantt.

The defence was, that the horse was unsound at the time of the sale, of which unsoundness he died shortly after.

It is unnecessary to detail the evidence on the part of the defendant. It is sufficient to state that it went to show the unsoundness of the horse at the time of the sale. But it was not pretended that the plaintiffs had any knowledge of the fact, or that there was any misrepresentation or deceit practised by them.

When the evidence was closed on the part of the defendant, the plaintiffs contended that in a sale under an order of the Court of Ordinary by an administratrix, there was no implied warranty of the article sold.

That on an implied warranty, there could be no recovery or defence without an offer to return the property, or evidence to show that such return was impracticable.

These positions being overruled by the Court, the plaintiff called Allston Coit to rebut the evidence given on the part of the defendant, with regard to the soundness of the horse. He was sworn on his *voire dire*, and said he had sold the horse to the plaintiffs' intestate, in May preceding the January when he was sold by the plaintiffs to defendant. He was asked, whether he would not be liable if the horse was unsound when he sold him? He said he supposed he might be. He was then objected to as incompetent; and the objection was sustained by the Court, and a decree given for the defendant.

This was a motion to set aside that decree, and to grant a new trial on the two grounds above mentioned, and also on the ground, that the testimony of Allston Coit ought to have been admitted.

Mr. Justice *Nott* delivered the opinion of the Court. The doctrine of implied warranties, has so long prevailed in this state, and has been so well illustrated by a series of uniform decisions, ever since the revolution, that no one thinks it now a subject of litigation. And it is not a question now submitted to us whether a warranty of soundness of property may be inferred from soundness of price, but whether that rule of law is applicable to executors and administrators, and others acting in a representative capacity.

I formerly entertained an opinion that it did not apply to cases of that description. I still doubt whether, on any ground of public policy, or the principles of the Common Law, it can now be maintained. But there have been so many decisions in which it has been held to apply as well

to persons acting in a representative character, as to those acting in their own right, that I feel bound to yield to their authority. I take it, however, that this distinction is still to be observed; that executors or administrators are not to be considered as personally responsible, except in cases of misrepresentation or deceit; and therefore would not be liable where the money had been paid over, or the estate fully administered. The foundation of the action does not appear to me in such case to depend so much on any supposed undertaking on the part of the seller, that the property is sound, as on the moral obligation which every person is under to give an equivalent for what he receives. If therefore a seller receive the full price of an article, apparently valuable, which is intrinsically defective and worthless, the law imposes a duty, and thereby implies a promise, that he will refund the money; because he has received that which *equo et bono* he ought not to retain. So where the money has not been paid, the defendant is absolved from his contract on the ground that the consideration has failed. It is in the latter case in particular, that this remedy is allowed against executors and administrators, while the money is, as it were, *in transitu*, and before it has been paid away in the course of administration.

The second ground appears to be bottomed on a misapprehension of the decisions of this Court. The mistake has arisen from confounding the action of *assumpsit* on a special promise or undertaking, with a general *indebitatus assumpsit* for money had and received. It was held in the case of *Weston vs. Downs*, (*Douglass* 23,) and in *Fowler & Williams*, and *Byers & Bostwyck*, in this Court, (*1 Const. Rep.* 75,) that as long as the contract remained open or not rescinded by the return of the property or otherwise, an action for money had and received, would not lie. But it never has been held in this Court that a special *assumpsit* on the implied warranty might not be maintained, even though the contract had not been rescinded. The objection in all the cases has gone to the form of the declaration, and not to the action. The dis-

inction, therefore, cannot exist, where the unsoundness or want of consideration is set up by way of defence.

But, on the last ground, I think a new trial ought to be granted. The witness does not appear to have had any immediate interest in the event of the suit; neither could the judgment in this case be given in evidence for, or against him, in any future action. If the title of the horse had been in question, his interest would have been manifest, because the defendants might have had recourse to him in case a decree had been against them. But it did not follow, that because the horse was sick in January, he must have been so the spring preceding. The objection might perhaps have gone to his credibility; but that was a question for the Jury, and not for the Court.

The motion must therefore be granted.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

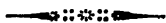
Blanding, for the motion.

Williams, contra.

(a.)—In the case of the Commissioners of Roads vs. Macon & Foot, (2 Judge Brevard's MS. Rep. 392, Columbia, Nov. 1806,) it was decided "that a public agent who sells an estray, according to law, is not liable for any defect of the estray, on an implied warranty. It was also held, that the defendant, when sued on his note, given for such property, might make the failure of consideration a matter of defence.

(b.)—See *ante*, Whorten vs. O'Hara.

R.



L. & J. RYAN vs. The Admor. of A. MARSH.

An action of assumpsit, for use and occupation, cannot be supported when the possession is tortious.

THIS was an action of assumpsit, tried before Mr. Justice *Richardson*, at Edgefield, March, 1819; for use and occupation, money had and received, &c.

It appeared that the intestate, A. Marsh, had taken possession of the plaintiff's land, and kept it a considera-

ble time ; and plaintiffs claimed, in this action, the value of the use and occupation. It was admitted that the intestate took and kept a tortious possession of the land, upon which the Judge nonsuited the plaintiffs. The motion was to set aside the nonsuit, because the plaintiffs might support the action of assumpsit for use and occupation, though the possession was tortious.

Mr. Justice *Richardson* delivered the opinion of the Court.

How can this motion be sustained? Assumpsit presupposes a contract. And can contracts be predicated of an avowed trespass? This would be to reconcile things opposite in nature. It was argued that a contract might be implied, and certainly as long as the character of the act, done by the defendant, was doubtful, a contract might be implied, as was admitted and even ruled in a preceding part of this case : but when it was admitted, that the possession was tortious, every characteristic of a contract was excluded. The entry could not be both by tort and by contract ; for either destroys the other. Any action bottomed upon a supposed contract must fall ; when it is evident there was no contract. If authorities were wanted, *Espinasse's Dig.* 57, (*Gould's Ed.* part 1) comes to this conclusion : " Therefore no action for use and occupation will lie when possession has been adverse and tortious ; for such excludes the idea of a contract, which in all cases of this action, must be express or implied." And this position is fully supported by the case of *Beril vs. Wright*, (1 Term Rep. 378,) and by that of *Smith vs. Stewart*, (6 John. Rep. 46,) and *Wharton vs. Fitzgerald*, (3 Dallas 503.)

If then, assumpsit would not have lain against *A. Marsh*, if alive, for this tort, her death cannot give that action against her representatives. In other words, the action which required a contract before her death for its basis, still requires contract, and is essentially the same now as then. To me it appears, that the tort committed in this case,

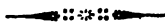
like other trespasses done by force, is one of those wrongs which dies with the defendant. If the plaintiffs could show some actual conversion of their property into money, as by selling their timber for cash, or by receiving rents for the land, &c. such acts might authorize the action of assumpsit; the receipt of the money, having no inseparable connection with the tort on the freehold, may imply a contract: And so indeed might the bare occupation of the land as long as it is left to implication to determine—whether the occupation was with the permission of the owner or not.

The motion is unanimously refused.

Justices *Colcock*, *Nott*, *Johnson*, and *Gantt*, concurred.

Ellison, for the motion.

M' Duffie, contra.



THE STATE vs. HENRY TURNAGE.

The defendant was indicted for negro stealing under an act passed while South-Carolina was a province; the indictment concluded "contrary to the act of the General Assembly of the said state, in such case made and provided," and a motion made in arrest of judgment, because it was not an act of the "state" but of the "province." Held, that the indictment was good.

TRIED before Mr. Justice *Gantt*, at Sumter, October Term, 1819.

The defendant was convicted of stealing a negro. The indictment on which he was tried, concluded "contrary to the act of the General Assembly of the said state, in such case made and provided."

The judgment was arrested because the act on which the prisoner was indicted was not an act of the *General Assembly of the state*, but of the *General Assembly of the province* of South-Carolina, the same having been passed in 1754, before the declaration of independence.

Mr. Justice *Golecek* delivered the opinion of the Court.

Indictments must have a precise and sufficient certainty in all respects. The crime must be clearly and distinctly set forth, and it must appear when the offence is created by statute, that the accused is indicted under the statute; as well for the purpose of enabling him to make his defence as for the purpose of enabling the Court to pronounce the judgment of law: Hence all indictments founded on particular acts are required to conclude against the form of the act in such case made and provided, but it is not necessary to state when the act was passed. In this case there is but one act against the offence, and therefore it was impossible the prisoner could not have known what act was referred to, nor can there be any danger of a wrong judgment in the Court. Indeed, the word, "state," in that part of the indictment, which speaks of the act, may be considered as surplusage. It would have been sufficient to have said against "the act in such case made and provided:" But I take it, the language is strictly correct, for as I have before said, the reference is to the act and not to the time when the act was passed. It is an act of a General Assembly, and an Assembly of this State, to speak in the language of this day.

But what is conclusive, if the subject involved any difficulty, is that this has been the uniform language, and in relation to the acts passed before our independence, in all the indictments which have been preferred under that act.

Motion discharged.

Justices *Johnson*, and *Richardson*, concurred.

Mr. Justice *Nott*:

I concur in the opinion of the Court, on the ground, that the form of the indictment is conformable to the precedents which have been used ever since the revolution.

Miller, for the motion.

Evans, Solicitor, contra.

E. HASKELL & C. B. COCHRAN, survivors, vs. PETER KEEN & BENJAMIN HART.

A bond was given by two obligors, to three obligees, one of the obligees (A.) who had received the property, for which the bond had been given, gave the obligors a bond of indemnity. *Query?* If it be a release?

The bond of indemnity is an acknowledgment on the part of A. that he had received the value for which the original bond was given, and though it may not be a discharge, yet, as between A. and the obligors, under our discount law, it would have been a bar to A's recovery on the bond, and ought to be regarded as a payment to A. who was competent as one of the obligees to receive and discharge the obligors, *ut videtur*.

A confession by one co-obligor, that he had never paid, and that he believes the other had not, is not sufficient to rebut the presumption that the other obligee had paid.

After twenty years a bond will be presumed to have been paid, unless such presumption be rebutted.—(a.)

TRIED before Mr. Justice *Johnson*, at Columbia, October, 1819.

This was an action of debt on a bond, payable to the plaintiffs and *John Paul Thomson*, whom they had survived, dated the 10th April, 1794, conditioned for the payment of 720 pounds, on the 1st January, 1796; and the action was commenced on the 12th February, 1816, so that more than twenty years had run from the time the bond became due to the bringing of this action. The presumption arising from the length of time, was the defence relied on, under the plea of payment. To rebut this presumption, the plaintiff gave in evidence a certificate given by the defendant, *Hart*, in the following words, to wit: "I, *Benjamin Hart*, do hereby certify, that I have never paid the bond on which this action is brought, nor do I believe the defendant, *Peter Keen*, has paid it, *the bond of indemnity now shown with this, shows who was to pay this debt*, and I heard *John Paul Thomson*, some time about the year, 1811, regret that he was largely indebted to *Major Haskell*, which he was unable to pay, March 23, 1819, "Signed *Benjamin Hart*."

On the production of the bond of indemnity, referred to in this certificate, it proved to be a bond made by *John Paul Thomson*, to the defendant, *Peter Keen*, dated in 1794, in the penalty of 1400 pounds, with a condition annexed, reciting that the said *Peter Keen* had purchased at public sale, seven tracts of land and eleven negroes of the said *Elnathan Haskell*, *Charles B. Cochran* and *John Paul Thomson*, for the sum of 720 pounds, and had given the bond on which this action was brought, with the defendant *Benjamin Hart*, as security, to secure the said purchase money, and that the said *Peter Keen* had, at the request of the said *John Paul Thomson*, executed conveyances to him for the whole of the said land and negroes in fee simple. That the said *John Paul Thomson* had in consideration agreed and took upon himself, "well and truly to pay, satisfy, or discharge, the said bond, and to indemnify and save the said *Peter Keen* and *Benjamin Hart* harmless from all damages to be sustained by reason of the said bond, &c."

It also appeared, that the property purchased by the defendant, *Keen*, and conveyed to *John Paul Thomson*, had been before conveyed by Colonel *William Thomson*, the father of *John Paul Thomson*, to the said *E. Haskell*, *C. B. Cochran* and *John Paul Thomson*, in trust to pay his debts; and that the purchase made by *Keen* was under a sale in pursuance of the trust: And this deed of trust contained a limitation over of the remainder, after the payment to Colonel *Thomson* and his heirs, &c.

The defendant then gave in evidence an advertisement, written by *E. Haskell*, in the name of the trustees, giving notice to the creditors of Col. *Thomson*, that the trustees were in funds, requesting them to call and receive payment, to enable them to close the trust; and also a great number of receipts, given by *E. Haskell* to *John Paul Thomson*, dated from 1799 to 1810, purporting to be in full of all accounts, &c. They also gave in evidence the receipts of *Haskell* and *Cochran* for legacies, under the will

of Col. Thomson to *John Paul Thomson*, who was his sole executor.

The Jury, under the direction of the Court, found a verdict for the defendant; and a motion was now made for a new trial on the following grounds:

1st. Because the written declaration of *Hart*, that he had not paid the debt, rebutted the presumption of payment arising from the length of time.

2d. Because the bond of indemnity entered into by *John Paul Thomson*, to the defendant *Keen*, did not discharge the debt.

Stark, for the plaintiff, contended that he was entitled to a new trial on both the grounds stated in the brief. His Honor was incorrect in stating to the Jury that the bond of indemnity was a release.

A bond of indemnity is not a release. It is different from a bond not to sue. He admitted that a bond not to sue, was a defeasance. (1 *Esp. Dig.* 2d part 85,) see also *Clayton vs. Kinaston*, (1 *Lord Raymond*, 419.) What did the parties intend? Not a release. It cannot be considered a release.

If it be a release, it should have been pleaded. (1 *Esp.* 2d part, 85.)

But upon the other ground. The presumption of payment was completely rebutted. The declarations of one co-defendant is enough to conclude the others. He referred to *Somerset vs. France*, (1 *Str.* 659.)

M'Cord, for the defendants; (*William F. De Saussure*, on the same side.) There is nothing in the nature of this case, that constitutes any difference between it and the numerous other cases, where the presumption of payment has arisen after a lapse of 20 years. The admissions of *Maj. Hart* do not rebut the presumption that *Dr. Keen* paid the bond; for in the bond *Keen* evidently seems the principal. *Hart* is only mentioned at the bottom of the bond. *Hart's* admission refers to the bond of in-

demnity, which, if not a release, must, at least be regarded as an evidence of payment. So, "if he whom it concerns to have my part of the covenant fulfilled, is the occasion why it is not, it is the same thing to me as if it were fulfilled." (1 *Pow. Cont.* 420.)

Thomson, one of the obligees, received the negroes for which the bond was given, and if such receipt be not regarded as a payment, it certainly is the cause why Keen did not perform his covenant. The power to perform was taken away by the obligee, and thereby he released the obligors from further performance. To say otherwise, would be no less than to assert that a bond could only be paid by money. In *Skip vs. Huey, et al.* (3 *Atk.* 91,) receipt of notes from one obligee, in lieu of the bond, was held to releave to the other obligor.

Any collateral satisfaction may be agreed upon. (1 *Pow. Con.* 451. 7 *Mod.* 144.)

It is not denied but that one co-obligee may release. (1 *Bridgman's N. P.* 277. citing 2 *Roll. Abr.* 410, pl. 47. *Bayley vs. Lloyd*, 7 *Mod.* 250.) And a release to one obligor is good for them all. (1 *Bridg. N. P.* 277, 278. *Cheetham vs. Ward*, 1 *Bos. & Pul.* 630.)

A bond of indemnity is a release or defeasance. The case of *Clayton vs Kinaston*, is clearly in our favor. There it was held, that a bond of indemnity to *one among several* obligors was no defeasance; but it was also held that an undertaking to indemnify *a sole* contractor, was. There can be no distinction between an indemnity to *a sole* contractor, and to *all* the contractors, for they are the *sole* contractors. That there is but one person to the deed, cannot be the reason why it works as a defeasance. The reason must be, because the contract of indemnity is made with all of the contractors; for a release to one (3 *Salk.* 298, *Lacy vs. Kinaston*), of two, does not discharge the right, but only the remedy against the party to whom the indemnity is given, for he may still have his action against the other. But not so where the indemnity is to all, or the

sole obligor. The right and remedy are both gone as to all the parties.

A covenant to discharge, is a good bar. (*Hodges vs. Smith, Cro. Eliz.* 623)

We admit that a release generally ought to be pleaded. But in this case the plaintiff gave in evidence admissions which called for this bond. The bond was therefore adduced in evidence by their own act. The whole of confessions must be given in evidence. He then, cannot now, especially after verdict, when no objection was made below, object to the manner in which the bond was produced.

Justice, at least, has been done in this case, and the Court will not therefore grant a new trial, unless there has been gross error.

Mr. Justice *Johnson* delivered the opinion of the Court.

It is not now necessary to enter into an investigation whether twenty years is *per se* sufficient to authorize the presumption, that a bond which has been suffered to lie dormant for that period, is paid. It is a principle long acted upon by this Court, and solemnly recognized in the late case of *Admor. of Cohen vs. Exors. of Thomson* brought up from Orangeburgh; and I think indeed, it is so well settled that I should always regard it as conclusive, unless repelled by circumstances; and there is no doubt, it may be. (*Phillipps* 114.) These circumstances must go to prove, either that the debt was still subsisting, such as a recent admission of the debt or the payment of a part, or interest, and the like, or to account satisfactorily why an earlier demand was not made; such for instance as a legal disability in the plaintiff to sue, and the like. (*Phillipps* 114.) This case then is resolved into the single enquiry, whether the evidence is sufficient to repel the presumption arising from the length of time?

The reasons upon which these rules are founded, are that in the ordinary concerns of men, few feel the inclination, or find it convenient to let a debt stand over for so great a length of time, and in the general course of things

It is rare, that the evidence of payment, whether it depends on memory or is written, is preserved so long.

Let us then test this case by these principles.

The only evidence offered to rebut the presumption in this case, is the certificate of the defendant, *Hart*. It appears to me, that it would be an appropriate answer to the argument founded on this fact, to observe that this admission does not profess to state, that the debt was not paid by the other defendant, further than as a mere matter of opinion; and the bond of indemnity referred to, in that certificate, proves, that *John Paul Thomson*, one of the obligees, had undertaken to discharge him from the payment. That discharge might have been effected either by Thomson's putting the amount of bond into the trust fund, or by giving the defendant a written release. Now there is proof from which, I think, it might be fairly inferred, that *Thomson* had paid it into the trust fund; for the trustees advertised, that they were in funds to pay the creditors, and the remainder is limited over to Colonel *Thomson* to whom *John Paul Thomson* was the sole executor and residuary legatee, and the present plaintiffs have received their legacies under his will on a final settlement of the estate. And it is unreasonable to believe, that, if this debt had been wanted for the purposes of the trust or was considered as a part of the estate of Colonel *Thomson*, that it would have been suffered to lie over to this time, and if it was not necessary for either of these purposes, it devolved on *John Paul Thomson* alone as the residuary legatee of Colonel *Thomson*. But in another view I think it is equally satisfactory. From all the circumstances it evidently appears, that the debt was incurred by the defendant, *Keen*, as the friend of *John Paul Thomson*, and the bond of indemnity shows, that it was never intended, that he should pay it in coin, and it is only necessary to presume, that *John Paul Thomson* did in pursuance of his solemn obligation pay the debt or discharge *Keen* from it, either of which is within the reason of the rule.

There is another view of the subject. The bond of

indemnity is an acknowledgment on the part of *John Paul Thomson*, that he had received the amount of this bond in the lands and negroes conveyed to him by *Keen*, and although I am not now prepared to say, that the bond itself is a discharge from this debt, yet as between them under our discount law, would have been a perpetual bar to *Thomson's* recovery on this bond, and ought, I think, to be regarded as a payment to *Thomson* who was competent as one of the obligees to receive it and discharge the defendant.

The motion is refused.

Justices *Golcock*, *Nott*, *Gantt*, and *Richardson*, concurred.

(a.)—The Executors of *ROBERT SMITH* vs. *WILLIAM RICHARDSON*.

THIS was an action of debt, on a bond which had been due *nineteen years and about nine months*.

The defendant pleaded *solvit ad diem*, and relied on the presumption of payment arising from lapse of time, together with some circumstances appearing on the face of the bond. It purported to be due from *Mrs. Ann Richardson* and *William Richardson*. Two seals were affixed to it. But it was signed by *William Richardson* alone; and his name was placed opposite the lower seal.

The case was tried at Sumter, Fall Term, 1818, before Mr. Justice *Nott*, who after explaining the law, submitted the case to the Jury, who found a verdict for the plaintiff.

This was a motion for a new trial on the ground that the verdict was contrary to law and evidence.

Mr. Justice *Nott* delivered the opinion of the Court.

The rule of law on this subject, as settled by several successive decisions of our Courts, is, that a lapse of *twenty years*, from the time mentioned in the condition, affords such a presumption of payment as will amount to a complete bar to plaintiffs action, where no interest has been paid, and there is no other circumstance to negative the presumption of payment on that day.

A shorter period, when accompanied by other circumstances from which payment can be inferred, may be left to the Jury.

The circumstances relied on in this case in aid of the presumption of payment, are that it appears to have been the intention of the obligee to take a bond from two persons, whereas it is only executed by one; and as the name of that one is prefixed to the lower seal, it is presumed that he was only surety and received no consideration.

for the bond; and as it never was executed by the supposed principal, it is contended the court ought to presume that it never did take effect, or was afterwards paid by the principal in exoneration of the security.

But very little can be inferred in favor of the defendant from these circumstances. It does not follow that because the plaintiff's testator intended that Mrs. *Richardson* should have signed the bond with her son, that it was her intention to have done so. Neither does it follow, that because *William Richardson* subscribed his name to the lowest seal, he was only security. On the contrary, it is not to be presumed that any person would make himself liable by bond to pay a debt as security for another, before it had been executed by the principal.

The delivery of the bond by the defendant is conclusive as to him so far as regards the first point. The legal obligation on him was as strong as if it had been executed by both.

The relation in which the intended co-obligor stood to the defendants would, in all probability, have furnished him with the means of proving the fact if she had paid the debt, or at least of producing some circumstance in support of it.

Another circumstance relied on, is, that the action is brought by the executors, whereas the original obligee never attempted to enforce payment in his lifetime. If it had been shown that the original obligee lived till within a short period of the commencement of this action, an inference favorable to the defendant might perhaps have been drawn from it. And if such had been the fact, the evidence of it might have been easily obtained. But no such evidence was adduced. And there is some reason to believe that the reverse was the case; from whence a contrary presumption would arise.

Upon the whole, the Court does not see any thing in the case which made it the duty of the Jury to find a verdict for the defendant, much less is the evidence of that sort as entitles him to a new trial.

Justices *Colcock*, *Cheves* and *Johnson*, concurred.

Mr. Justice *Gantt* dissented.

Mayrant and *Blanding*, for the motion.

Bullard, contra.

In the case of *Gratwick vs. Simpson & Moore*, it is said, "The Judges have laid it down now as an invariable rule, that if there be no demand for money due upon a bond for twenty years, that they will direct a Jury to find it satisfied, from the presumption arising from the length of time." 2 Atk. 144. See also *Colsell, et al. vs. Budd, et al.* 1 Camp. N. P. C. 27. *Forbes, Exor. vs. Wales*, 1 Black. Rep. 532. *Reid vs. Stephens*, 1 Bur. 434. *Mayor of Hull vs. Horner*, 1 Cowper, 109. *Dunlap vs. Ball*, 2 Cranch, 183-4. *Cottle vs. Payne*, 3 Day's Cas. 289. *Thompson vs. Skinner*, 7 John. 556. *Exors. Brewton vs. Exors. Cannon*, 1 Bay, 482. *Palmer vs. Dubois*, 1 Const. Rep. 178. R.

DAVID REID vs. ROBERT HOOD & SAMUEL BURDINE.

A judicial officer is not liable for an injury which may come to a party, by reason of an error of judgment which the officer may have committed by his adjudication, in a trial before him.—(a.)

TRIED before Mr. Justice *Richardson*, at Pendleton, October Term, 1819.

The defendant, *Burdine*, being a justice of the peace, had issued an attachment at the suit of the other defendant, *Hood*, against the plaintiff, *Reid*, by virtue of which the plaintiff's horse, saddle, bridle, &c. were taken from him and out of his immediate possession.

The proceeding was founded on that clause of the Attachment Act of 1785, (*P. L.* 368, 1 *Brev. Dig.* 39.) which allows an attachment to be issued on oath, by the creditor, that he believes his debtor intends to remove his effects, returnable to the next court.

The debt was above fifteen dollars. The attachment was made returnable before *Burdine*, who proceeded to give final judgment, and condemned the property to be sold, which was done at less than half its value.

This action was trespass, and was brought on the belief, that the magistrate had exceeded his jurisdiction in making the process returnable before himself, instead of the District Court, (as required by that clause of the act under which it was issued) and thus he gave himself cognizance of the case: And because the jurisdiction of a justice, in cases of attachment, is limited by the same Act to three pounds.

It was proved on the trial, that the justice, *Burdine*, on being told a suit would be brought by *Reid*, said he thought he might be doing wrong, but that he was safe, having taken a bond from *Hood* of five hundred dollars to indemnify him.

The Presiding Judge charged the Jury, that the Justice was not liable, unless he had acted *wilfully wrong*; and that *Hood*, the plaintiff, in attachment, was not liable if the Justice was not.

The Jury found a verdict for the defendant.

The plaintiff moved the Constitutional Court for a new trial on these grounds :

1st.—Because, in this case, the justice was liable for assuming jurisdiction, whether knowingly or not.

2d.—Because the verdict of the Jury was manifestly contrary to evidence, there being proof, that he knew he was wrong.

3d.—Because one of the Jury that tried the cause had received (without the plaintiff's consent or knowledge) all the remainder of the proceeds of the sale, after paying the attachment, for a debt said to be due to him from the plaintiff; he was therefore benefited by the proceeding and interested in establishing its legality.

The opinion of the Court was delivered by Mr. Justice *Richardson*.

The first ground requires this Court to consider whether a *judicial officer* is liable, for any injury which may come to a party, by reason of any error of judgment which the officer may have committed by his adjudication, in a trial before him? There is no view which can be taken of this enquiry that does not answer it in the negative.

The essential and characteristic distinction between a *judicial* and a *ministerial* officer is, that the former is to give judgment, which requires perfect freedom of opinion; but the latter is to execute, which supposes obedience to some mandate prescribing what is to be done; and leaving *nothing* to opinion.

Now as opinion upon any subject is various and uncertain, we cannot direct the judgment, but must leave it to the honest dictates of the officer's peculiar intellect, upon information acquired; and both information and intellect are so different, in different men, that it is vain to look for the same correctness of adjudication. In all judicial questions, then, the very aim and duty of the officer is to give his true opinion after due enquiry; if errone-

ous, he can no more answer for the error than for the head which Heaven has given him. All we ask of such an officer is the just picture which has been impressed upon the tablet of his intellect by the facts and the law together; and however discoloured and distorted it may come out, yet if it be the true image of his intellectual impression, we get just what we require, and all that he can give. Opinion then having no fixed test, nor measure, no equal scales, nor weights, all we can answer for is its honesty.

Turning from the intrinsic character of the judicial officer, let me ask, if there is a known instance of a judge being rendered liable for a mere error of judgment? I believe not one. Nor does the immunity I have alluded to, belong to judicial officers, properly so called, alone. It belongs, I conceive, to every one whose mere opinion is called for, whatever may follow from the opinion offered. Suppose a counsellor to err, in his opinion, is he liable? Never; unless *wilfully wrong* or *negligent*, or at least convicted of such *ignorance* as shows a *depravity* in undertaking to give an opinion.

Suppose a Jury to give an unfortunate and mistaken verdict; or the governor in a question referred to his opinion were to commit an error, to my injury, or a legislator to introduce a law, which brings down ruin upon me; and suppose either of these were sued at law; what would be the only safeguard in a Court? Simply, that his opinion being required, he honestly gave it as dictated by duty. At the same time there is no doubt that an *extreme wildness* of opinion may prove a *depravity* or a *wanton disregard* of doing a wrong, either of which may make any officer liable. The pretence of ignorance, or the mantle of opinion cannot protect or hide enormities. These would, in themselves prove the heart depraved, and not the head merely mistaken. And then as was observed to the Jury in the case before us, the judicial officer would be liable to any extent; and perhaps become more culpable than any other whatever; evidently I think, because there

is reposed in him higher confidence and greater discretion; and touching these, he of course commits greater treachery than others whose integrity is less confided in.

Let us turn now to the probable effects of holding a judicial officer accountable for errors of judgment. Errors not a few, he must of course commit, and many more in the opinion of those who judge his acts. His post would not be tenable by the ablest; for pecuniary ruin must attend his best exertions; while he in turn would pursue those who misjudged his judgment. Suppose for instance the judge and jury had given judgment, for a mere mistake, against the justice, in the case before us; might he not in turn have sued this judge and jury for their mistake? And judgment being rendered for or against these, no matter which, the losers would have a right still to pursue in like manner their mistaken judge and jury, and so on to infinity. If there could be a sea of litigation, wide, deep and stormy, we should have it here, and all that I have noticed, the well meaning magistrate and the faithful counsellor, the honest juror, and the upright judge, the patriotic statesman and the magnanimous governor, steeped in litigation, would be all adrift in a perilous deep. No doubt some few would still venture out; but could we find a *Palinurus* able to swim three days and three nights to catch even the glimpse of his destination, without hyperbole, would not any judicial officer become interested to do no business? And what an interested feeling might it not introduce interchangeably to cloak each others errors; for man is man, and the selfish principle rules him.

As to the second ground, I have already said, if the justice acted *wilfully*, he is liable; and certainly when a judicial officer takes a bond of indemnity for his acts, it is good proof that he suspected his own proceedings were *erroneous*. *It is very reprehensible indeed*. But many of these justices, though honest, are so ignorant, and are yet so indispensable, that we cannot, after the jury have found that the defendants error was not wilful, consent to give a

second chance to a hard action. The error too is not palpable. Justices have jurisdiction in cases of attachment to 3*l*. and many imposing arguments of analogy may be drawn, both from the constitution and from decisions upon the extent of their jurisdiction, to show that it is extended to §20, even in such cases, and the very doubt is some excuse. And though I may still suspect all that was meant by that bond, did not meet the eye, and though he probably went beyond his jurisdiction, which is much against him, yet, after the verdict at least, I am disposed to treat Justice *Burdine* with the forbearance towards his errors, recommended by Sir *Wm. Blackstone*, (see Vol. 1, 354.) to be observed towards justices generally.

And though I cannot add with the good Prior (speaking of women,) "let all their ways be unconfined," yet, I will say with him,

"Be to their faults a little blind,

And to their virtues very kind."

Upon the third ground, there is scarcely such an interest in the juror as to render him incompetent to try the case. And were it greater, it is too late to take advantage of it after the trial without notice to the jurors as has been before decided.

The motion is dismissed.

Justices *Colcock*, *Nott*, *Gantt* and *Johnson*, concurred.

B. J. Earle, for the motion.

M Duffie, contra.

(a.)—*JOHN YOUNG vs. WALTER HERBERT.*

TRIED before Mr. Justice *Colcock*, at Newberry, October Term, 1815.

This was an action on the case against the defendant, as a magistrate, for refusing to admit the plaintiff to bail, who was charged with having begotten a bastard child.

It appeared, that the defendant was a magistrate, and that the plaintiff was brought before him on a charge of being the father of a bastard child. That when before the magistrate, he rather confessed himself (in the language of the witness) to be the father of the child by saying he supposed the girl would not swear to a lie. But he required that

he should be bailed, saying he would have a trial before a jury. He offered *Henry O'Neal* and *Benson Jones*, as his securities for his appearance at Court, to stand his trial. But they refused to be his securities, for the maintenance of the child. The magistrate refused to bail him, thinking it was his duty to commit him. *Henry O'Neal*, who was also a magistrate, said it was his opinion on reading the act that it was the duty of the defendant to commit the plaintiff; but that he, defendant, appeared willing to avoid it:—That he had nothing like malice. The plaintiff was committed and remained in gaol about eight days. It also appeared that the defendant offered to bail him after his confinement, if he would give a note for fifty dollars, for the use of the woman and child, and good security for his appearance at Court. The defendant refused two applications for bail unless these terms were complied with.

On this evidence the Jury found a verdict for the defendant, and the plaintiff now moved for a new trial:

Because the verdict is against law in as much as it was the obvious duty of the magistrate to bail and not to commit to prison when the party insisted on a trial by Jury.

Because it was the duty of the magistrate to admit to bail if the party was unable to give security for the maintenance of the child.

Because the verdict was against both law and evidence, in the following particulars:

The plaintiff insisting on a trial by jury was a sufficient denial, that he was the father of the child:

The plaintiff offered good bail for his appearance, but was unable to give security for the maintenance of the child.

Because the plaintiff was immediately hurried away to prison in the night, without the opportunity of giving the security, were he able to do so.

Because the plaintiff was ultimately admitted to a trial by Jury.

Because the defendant requiring a note of fifty dollars, as a consideration of bail, and hurrying the plaintiff so suddenly to prison, was evidence of malice and oppression.

The opinion of the Court was delivered by Mr. Justice *Colcock*.

When a public officer is called on to discharge a duty merely ministerial, and which he has frequently discharged, the nonperformance of it will of itself imply malice. But where he is called on to exercise his judicial authority, malice must be proven to make him answerable in damages.

In the case before me the magistrate was called on to decide whether the plaintiff was entitled to bail, and this depended on the construction of an act, which, to say the least of it, is by no means perspicuous in its language. The witness *O'Neal*, who was the friend of the plaintiff, and a magistrate, upon reading the act, declared it as his opinion, that the defendant was bound to commit the plaintiff, and if the plain-

tiff's expressions are to be construed into a confession, that he was the father of the child, the defendant was unquestionably bound to commit. But as he claimed the trial by the Jury, and the offence was a bailable one, I think he was entitled to bail.

It is stated in the grounds for a new trial that the defendant was hurried to gaol, and this it is said is evidence of malice; but the testimony does not warrant the assertion; for it is obvious that he did deliberate for some time, and consulted with the witness, who was a magistrate, and who declared that he (the defendant) was unwilling to commit the plaintiff.

It is also urged, that his offer to bail if the defendant would give a note for fifty dollars, is evidence of malice; but when it is recollected that the note was to be given for the benefit of the woman and child, it cannot be considered in that light, but rather as an evidence that he was desirous to relieve the defendant if he would make provision for the immediate wants of a child which he himself had given reason to believe he was the father of.

It is said the plaintiff was admitted to a trial. The fact may have been so. But it did not appear in evidence, and if he had been tried and acquitted, he could easily have proven it. Upon the whole, I can see no ground for a belief that the magistrate was actuated by malicious or corrupt motives, although he did err in his judgment.

I am therefore against the motion.

Justices *Grimké, Nott, Cheves, Gantt* and *Johnson*, concurred.

Crenshaw, for the motion.

Stark, contra.

See also *Lining vs. Bentham*, 2 Bay 5. *Brodie vs. Rutledge*, Do. 69. *Sill vs. Phelps*, 1 Day. Rep. 315. *Seaman vs. Patten*, 2 Caine's Rep. 312. *Yates vs. Lansing*, 5 John. 295. S. C. 9 John. 424. *Groenvelt vs. Burwell et al.* 1 Salk. 396. S. C. 1 Lord Raymond 454. 1 Com. Rep. 76. *Miller vs. Seare & others*, 2 Black. Rep. 1145. *Mostyn vs. Fabrigas*, 1 Cowp. 172.

R.

The STATE vs. JAMES A. WHYTE & RICHARD SADLER, Justices, and the Freeholders.

A prohibition may issue upon a suggestion that either the cause originally, or some collateral matter arising therein does not belong to that jurisdiction, but to the cognizance of some other Court.

A prohibition will not lie to an inferior Court after sentence, unless the want of jurisdiction appear on the face of the proceedings.—(a.)

A stealing of a slave may be committed by another slave, although no force be employed.

The act of 1754, making it felony without benefit of clergy, "to en-veigle, steal or carry away any negro or slave," &c. applies to negroes as well as white persons.

THIS was a motion at Chambers, before Mr. Justice *Johnson*, for a prohibition against the magistrates and freeholders, who had tried and convicted a negro man slave, named Billy, the property of Hugh Hershaw.

The negro was charged, 1st, with stealing a negro woman slave, named Hannah, the property of ———

2d. With enticing the said negro woman to leave the state.

3d. With aiding the said negro woman to depart from the service of her master.

The evidence was, that the prisoner had been several times at the house of the owner of Hannah; that he had endeavoured to induce another negro woman to go off with him, saying that his young master would carry her to a free country, that she declined, and then he made the same propositions to the woman Hannah, who consented. And he fixed on Saturday as the time when he would come for her; that on her suggesting a difficulty in getting off her clothes, he had promised to bring a horse. That while she was at work in her mistresses house on Saturday night, some person was heard to come to the door and make a noise, upon which Hannah went out, and has never been since seen or heard of by her owner. One of the witnesses said she had a glimpse of his face, and thought it was Billy, from his having made the bargain to come for Hannah on that night. Some evidence was then offered as to the character of the prisoner; but it was rather a negative character; upon which, after hearing counsel in behalf of the accused, the Court found the prisoner guilty and pronounced upon him the sentence of death. Upon a statement of these facts, a motion was made before Mr. Justice *Johnson*, at Chambers for a prohibition on the following grounds:

1st. Because the act of feloniously stealing, &c. a slave

by a slave, cannot be consummated, unless force is employed by the slave charged with the felony, of which there was no proof on the trial of this case.

2d. Because the act of endeavouring to delude and entice a slave to run away, provided for by the act of 1740, as explained by the act of 1751, consists in preparing provisions, arms, ammunition, horse or horses, &c. &c. whereby such intention may be manifest, of which there was no proof.

3d. Because the benefit of clergy is not taken away from the offence stated in the last ground, and ought to have been allowed.

4th. Because the act of aiding a slave in running away and departing from his owner, otherwise than pointed out in the act of 1740, and the explanatory act of 1751, is not a felony in a slave.

5th. Because the Court that tried the slave was not constituted according to the provisions of the act of assembly. The assistant justice and freeholders having been selected from remote and distant parts of the district, and not from the immediate vicinage.

This motion was refused, and notice was given of an appeal.

A motion was made to reverse the decision of the Presiding Judge, and for a prohibition on the same grounds as were stated before him, except the third, which is now abandoned.

Mr. Justice *Colcock* delivered the opinion of the Court.

A prohibition may issue upon a suggestion that either the cause originally or some collateral malice arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court. (*3 Black. Com. p. 112.*)

The enquiry then will be, whether this Court which has tried the slave had original jurisdiction of the case, and whether on any collateral matter arising on the trial of the case, they exceeded their jurisdiction or violated any of the laws of the land? The act of 1740, (*P. L. 52, 1 Brev.*

p. 463,) enacted, that all crimes and offences which shall be committed by slaves, in the (then) province, and for which capital punishment shall or lawfully may be inflicted, shall be heard, examined, tried, and adjudged, and *finally* determined by any two justices assigned to keep the peace, and any number of freeholders not less than three or more than five in the county where the offence shall be committed, and can be most conveniently assembled."

Upon an examination of the proceedings in this case, it is apparent that the provisions of this act have been complied with, and there can be no doubt, that it gives to those who tried the case, cognizance of the offence. Upon a just construction of the clause, I think it sufficient, that the magistrates and freeholders should be of the county. But if any objection could legally have been made to the jury, they should have been challenged at and before the trial. This is a sufficient disposition of the fifth, and what appeared to be the most material ground. But as it is a matter of great public concern, I will proceed to examine the other grounds. As to the first, the act of 1790, expressly declares, that "if any slave shall feloniously steal, take, or carry away any slave, being the property of another, with intent to carry such slave out of this province, he shall suffer death as a felon." This is one of the charges in the indictment. And as to the objection stated in the 1st. ground, that force is necessary to constitute the offence, I think it wholly untenable. If there had never been any other law on the subject, I should have said, that to entice a slave to leave his master, was a taking and carrying away within the meaning of this act. With inanimate subjects of larceny force may be necessary, and must be used; but is there any thing in reason or common sense which requires it as to those subjects of larceny which possess volition and locomotion? Is not the idea, as to both, the deprivation which the owner of the property sustains? Suppose a horse or a hog to be tolled out of the possession of the owner by corn, is not this as much a

taking and carrying away as the shouldering of a bale of goods would be? I confess I can see no substantial legal difference.

The second ground applies to the second count in the indictment. The act of 1740 declares it felony and death to those slaves who shall endeavor to delude or entice any slave to run away and leave this province. But the 58th and 59th clauses of the act of 1751, declares this punishment too great for the nature of the offence, as such offender might afterwards change his intentions, and enacts that the law shall not operate or take effect unless it appear, that such slave, so endeavoring to delude or entice other slaves to run away and leave this province, shall have actually prepared provisions, arms, ammunition, horse or horses, &c. Whether the evidence was sufficient to support this charge, is a question of fact, and might be made the ground of an appeal which is not for the determination of this Court.

It may not be amiss however, to observe, without determining on the weight of evidence, that there was testimony, that he meant to carry the negro out of the state; that is, he said, to a free country, which, as to her, must necessarily have been some other than this. And also that there was evidence that he did procure a horse, or what might have raised a presumption that he did, that he promised to carry off the clothes; that the clothes were carried as well as the slave with a celerity and success which would seem to imply the use of a horse.

As to the fourth ground, it is enacted by the act of 1754, "That from and immediately after the 24th of June then next ensuing, all and every person or persons who shall inveigle, steal, or carry away, any negro, or slave, or slaves, or shall hire, aid, or counsel, any person or persons to inveigle, steal, or carry away as aforesaid, any such slave, so that the owner or employer of such slave or slaves, shall be deprived of the use or benefit of said slave or slaves; or that shall aid any slave or slaves in running away or departing from his master's or employer's ser-

vice, shall be and he and they is and are hereby declared to be guilty of felony, and shall suffer death without benefit of clergy;" which act, when taken in connection with the other acts, seems to complete the system, and from the generality of the terms must be considered as comprehending negroes as well as others. The policy of the country as well as the express law makes it necessary that those offences which are declared to be felonious when committed by white men, should be also felonious, when committed by negroes. The former acts which relate to negroes only made it felony to steal or entice a negro so as to carry him out of the state. This act makes it so to steal or inveigle them or aid others in doing so, although they be not carried out of the state. If it were not for this act and its application to negroes, how easy would it be for evil disposed persons to make their slaves the agents of their villainy. Although slaves are held to be the absolute property of their owners, yet they have the power of committing crimes; and although in regard to this crime, they have not such inducements as whites, yet they may make it a business of gain, and may even by such acts obtain their own freedom. It has been adjudged, that a negro shall be considered so far amenable to the common law as to make one of three to constitute the number necessary to make a riot. *The State vs. Thackam & Mayson*, 1 Bay, 358.) If any further observation were necessary to show the necessity and propriety of comprehending negroes in the general words, "person or persons," used in this act, I would remark that the very next clause in this act extends the times within which negroes shall be tried for capital offences. From which I would infer, that the legislature had them in view at the time the act was passed; and I think the association of the subjects well warrants the conclusion. Having noticed the different grounds stated, I add, that prohibition will not lie after sentence, unless the want of jurisdiction appear on the face of the proceedings. (*Cowper* 422. 4 T. R. 382. *Douglass* 380.) In the last case some objection

was made as to a matter of fact. Lord *Mansfield* observed, "the objection being on a matter of fact, which did not appear on the proceedings, the prohibition could not be granted."

I am against the motion.

Mr. Justice *Richardson* concurred.

Mr. Justice *Nott*,

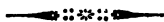
If the act of 1754 stood alone, I do not know that I should consider it as extending to negro slaves, but taking all the acts together, I think they embrace this case, and therefore the motion ought to be refused.

Mr. Justice *Johnson* concurred with Mr. Justice *Nott*.

Mr. Justice *Gantt* dissented.

Rodgers, for the motion.

Williams, contra.



JOHN F. WALLIS vs. ISAAC FRAZIER.

In an action of assumpsit upon a warranty, it is not necessary to state that it was in writing.—(a.)

THIS was a special assumpsit on a warranty of soundness of a negro.

On the trial, a written warranty, not under seal, was produced by the plaintiff.

The defendants counsel moved for a nonsuit, on the ground that the warranty should have been stated to have been in writing.

For this supposed defect in the declaration, the Presiding Judge, (Mr. Justice *Johnson*,) granted a nonsuit.

The case was tried at Columbia, October Term, 1819.

The plaintiff appealed from the decision on the ground that the nonsuit was improperly ordered. The law not requiring that the warranty should be stated in the declaration to have been in writing.

Mr. Justice *Gantt* delivered the opinion of the Court.

The motion has been ably supported by authorities, which show that such statement is unnecessary. (*See Rann vs. Hughes*, 7 Term Rep. 346. 1 Saund. 211.)

The nonsuit is therefore set aside, and the cause ordered to be reinstated on the docket.

Justices *Colcock*, *Nott*, *Richardson* and *Johnson*, concurred.

Nott & M' Cord, for the motion.

Stark, contra.

(a.)—Even “in a declaration upon a collateral promise to be answerable for the debt or default of a third person, or any other promise or agreement which is required to be in writing by the Statute of Frauds, 29 Car. 2, c. 3, s. 4, 17, it is not necessary to state the promise, or any note of it to have been in writing, or signed, though it must be so proved in evidence.” *Laves on Pleading*, Assumpsit 90. “But it may be otherwise in a plea.” (Ib.) See Anon. 2 Salk. 519. *Williams vs. Leper*, 3 Burr. 1890. R.



STATE vs. JOHN STRICKLAND.

A challenge to fight a duel under the act of 1812 may be given verbally, and whether the words used amount to a serious challenge to fight, or are the mere ebullition of passion, is a question for the jury.

TRIED before Mr. Justice *Richardson*, at Spartanburgh, November Term, 1819.

This was an indictment for a challenge to fight a duel, against the act of the 18th December, 1812.

It was proven that in a quarrel, between the prosecutor and defendant. Defendant, as the prosecutor expressed it, bantered him to go into the old field to fight a duel; to which he replied he did not fight in that way. Defendant had a gun in his hand, and prosecutor said to him, he had no gun there. Defendant told him to go and get his gun. He then observed he had no ammunition; upon which defendant offered to lend him some if he would get his gun.

The prosecutor declared the defendant appeared serious, and expressly said, "walk out and fight a duel."

Joseph Gilbert, said defendant did not use the word *duel*, at all, but the prosecutor himself, in refusing to fight, answered that the duel was the gentleman's way. He understood defendant to mean, if prosecutor saw cause to meet him, they would "fight it out," or knock it out. He said defendant was in a great passion. But another witness, *Davis*, said defendant offered prosecutor a duel if he would go into the old field. Prosecutor refused, saying that was the gentleman's *cut*. *Jacob Chapman* afterwards heard defendant acknowledge he had offered to fight the prosecutor from a broom straw upwards, or with guns. Defendant told the witness that the prosecutor refused, having no ammunition, whereupon defendant said he offered him ammunition. At the same time defendant said he would defeat the prosecution, because the law required a written challenge.

The Court submitted to the Jury, this enquiry: Whether there was sufficient proof of a challenge to fight with deadly weapons; or was it a mere effusion of passion, and expressions of empty threats, without any serious intention or expectation of a duel? The Jury found the defendant guilty.

The motion is for a new trial, because the evidence does not warrant the conclusion, that defendant seriously challenged the prosecutor to fight a duel.

Mr. Justice *Richardson* delivered the opinion of the Court.

Assuredly there is room for a difference of opinion whether the defendant seriously challenged the prosecutor to fight a duel or not. Much depends upon the habits and character of the parties. But this Court cannot say that a challenge may not be given in this open, public and boisterous way, though very unusual indeed. The act forbids the first step towards a duel, and punishes

the challenger. Its policy is, to intercept the first step towards a battle; its maxim *obsta principiis*.

We can lay down no general rules. The law makes every serious challenge to fight a duel, penal; and the proper tribunal have said, there was a serious challenge in this case. Now, can we gainsay the conclusion drawn? By no means. Though the testimony may possibly not prove it to every man, considering the characters engaged. Yet, with other characters, such testimony would be demonstration, to every man, of the serious intention of the defendant. There is no room then for us to interfere. And we can only warn, by these instances the unskilful, as well as those more thoroughbred, to beware of this dangerous tool, which may wound deeply; though the fashionable form was not practised in the use, nor any blood shed. The sole question is, was it intended to shed blood in a duel? The case of *Wilson Saunders*, was, it is true, much like the case before us, in point of testimony, except in the after acknowledgment made by this defendant to Chapman, that he had offered to fight, &c. &c. But that case was received with great favour indeed; because the Presiding Judge had advised the Jury to find *Saunders* guilty, in order to try if such a challenge could be brought within the then recent act; of which the Court had no doubt; but sent the case to be tried upon the only proper enquiry—was there a serious challenge to fight a duel? Which should have been sent to the Jury unbiassed by any recommendation to find a particular verdict, in order to try the law.

The motion is refused.

Justices *Colcock*, *Nott* and *Johnson*, concurred.

Mr. Justice *Gantt* dissented.

Gist, for the motion.

Davis, Solicitor, contra.

AUSTIN F. PEAY, EXOR. OF NICHOLAS PEAY, vs. THOMAS BRIGGS.

Where a question of location, between the purchaser and vendor, is doubtful, the purchaser will be concluded by his deed which called for a certain plat on a resurvey, which resurvey was present when the deed was made and referred to as the metes and bounds by which the vendor sold.

When to an action on a note given for the purchase of land, a defence is made, That there was a deficiency—the rule for ascertaining the deduction in the price is the *relative value* of the land, and not according to the *average price*.—(a.)

Where there have been two *concurrent* verdicts, there must be *manifest error or injustice* to induce the Court to grant a second new trial.

THIS was an action of assumpsit on a note of hand given for a part of the purchase money of a tract of land sold by plaintiff's testator to the defendant.

The cause was tried before Mr. Justice *Nott*, at Winnsborough, at a special Court, August 1819.

The defence was a deficiency of land, by reason of titles paramount in other persons; for the value of which the defendant claimed a deduction. The amount of deduction contended for was eighty-eight acres, taken off by a grant to Ogilvie, on one part; and also a hundred acres included in a grant to Genot, now belonging to Knighton, in another part of the land. The question with regard to Ogilvie's depended upon the manner of closing the lines. Knighton's depended merely on the relative value of the land. If the lines were closed from A. to B. Ogilvie's land was included. If from A. to C. then it would be extended, and the defendant would be entitled to no deduction.

Previous to the sale to the defendant, there had been a resurvey of the lands, and the lines closed according to the manner represented by the line, A. C. which resurvey was present when the deed was made and referred to as the metes and bounds by which the plaintiff's testator sold. The Presiding Judge instructed the Jury, that if it had appeared clear and manifest, that there was a mistake

in the former resurvey, and that the line, A. B. was actually the true line, he should have been of opinion, that the defendant would be entitled to a deduction for the Ogilvie tract. But as it was extremely doubtful which was the most correct method, he thought the parties ought to be concluded by the deed and plat referred to. The plat was by reference made a part of the deed, and the metes and bounds there exhibited were the lines to which the warranty extended and no farther.

With regard to the value of the Knighton tract, there were various opinions. Most of the witnesses however thought it more valuable than the other parts of the land.

The Jury found a verdict for the plaintiff, making a deduction for the Knighton tract. It is not known upon what principle the jury ascertained the amount to be deducted. But it is supposed, that they took the average value and not the relative value of the land.

This was a motion for a new trial on the ground, that the Jury ought to have allowed a deduction for both parcels of land according to their relative value.

Mr. Justice *Nott* delivered the opinion of the Court.

I am perfectly satisfied with the manner adopted by the Jury of closing the lines for the reasons given by the Court below. But I am not so well satisfied with the sum allowed on account of the Knighton tract. I think the relative value is the true rule. Monstrous injustice would be done in many instances, were it otherwise. It is not unusual to throw in, as of little or no value, considerable bodies of poor land when attached to valuable swamp land. Sometimes the poor land, which contains the greatest number of acres, is not estimated at all in the price. A deduction in such case according to the average price would, in many instances, deprive a person of the benefit of half his contract and more. There are nevertheless many reasons in this case, why the verdict should not be set aside. This is the second verdict equally unfavorable to the claim of the defendant. And it is not pro-

bable, that he would be more successful, were the case to be sent back. The witnesses differed very widely with regard to the value of the land, and in all probability, the difference in any event would not be enough to pay for the trouble and expense of another trial. The plaintiff must always have a verdict for some thing. And after two concurrent verdicts, there must be manifest error or injustice to induce the Court to grant a second new trial. I have but little doubt, that justice has been done by this verdict. There is reason to believe, that the defendant knew the situation of the land when he purchased, and that his defence is bottomed on a mere legal advantage, which he has got of the plaintiff, contrary to the justice of the case. He even now retains exclusive of the Knighton tract, a greater number of acres than he originally purchased.

Upon the whole, I am induced to think, that justice has been done, between the parties, and that a new trial ought not to be granted.

Justices *Colcock*, *Gantt*, *Johnson*, and *Richardson*, concurred.

Clarke, for the motion.

Peareson, contra.

(a.)—See post 189 in note, the case of *Furman vs. Elmore*. R.

JOHN MACKEY vs. EXORS. of JOHN COLLINS.

Defendant by deed granted, bargained, sold, and released, to the plaintiff a tract of land, to hold in fee, and by the said deed bound himself, his heirs, executors, &c. to warrant and for ever defend the premises to the plaintiff, his heirs, &c. against every person whomsoever, lawfully claiming or to claim the same or any part thereof. The plaintiff may maintain an action for the breach of such covenant, before eviction, by showing a paramount title in a third person.

THIS was an action of covenant, brought in Richland district, and called for trial before Mr. Justice *Gantt*, Spring Term, 1818.

The declaration stated that the defendant's testator.

John Collins, by deed, dated the 25th of November, 1811, in consideration of \$ 140, granted, bargained, sold and released to the plaintiff a tract of land containing 287 acres, to hold in fee; and in and by the said deed bound himself, his heirs, executors and administrators to warrant and for ever defend the premises to the plaintiff, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof: That at the time of the said sale, the said Collins was not the owner of the said land, but that the same belonged to one Jesse Baker, who then lawfully claimed the same, and that the said John Collins refused to warrant the said land against the said lawful claim of the said Baker, and therefore had broken his covenant.

Plea, non infregit conventionem.

The Court ordered a nonsuit, on the ground, that an action could not be maintained until there had been a legal eviction by an action at law.

This was a motion to set aside the nonsuit on the ground, that this was in effect a covenant of seisin and not for quiet enjoyment, and therefore an eviction was not necessary. And that even if it was to be considered a covenant for quiet enjoyment, still the action ought to have been supported.

The opinion of the Court was delivered by Mr. Justice Nott.

The covenant in this case is not in express terms a covenant of seisin, neither is it a covenant for quiet enjoyment. The question therefore is, what is the effect of a covenant couched in the terms that this is? If it was to be determined upon the authority of English decisions, perhaps the event would be doubtful, though there are cases in the English books which strongly favor the opinion attempted to be supported by the plaintiff's counsel. (10 Mod. 142, Hobart 12. 1 Selw. 442. Carthew, 97. 1 Salk. 137. 1 Selw. 478.)

But we need not perplex ourselves with a display of

legal lore, since the question appears to have been well settled by the practice and decisions of our own Courts. In the case of *Pringle vs. Executors of Witten*, the Court held that an action would lie before eviction. (1 Bay, 256.) It is true, that in that case, the defendant's testator had covenanted that he was seized in fee. But in the opinion of the Court, after observing, "that in a covenant for peaceable enjoyment, or on a general warranty, the action would not lie at *Common Law*, without a *previous* eviction." They say, "in a case where title and quantity are both warranted that doctrine does not apply." They further observed, "in the latter cases wherever there is a covenant for *good title* and for the *whole quantity*, in each of these cases, the action of covenant would lie," without eviction. (1 Bay, 259.)

I do not know what can be meant by "a covenant for good title and for the whole quantity," if the covenant in question is not one. With regard to what was observed of a covenant for peaceable enjoyment, it was not a point before the Court; therefore there was no necessity for the judges to have given an opinion upon it.

The case of the *Administrators of Bell* against the *Administrators of Huggins*, was an action of debt on bond for the purchase money of a tract of land in which the defendant was allowed to set up the breach of warranty by way of defence. (1 Bay, 326.) In that case also, there was a covenant that the grantor was lawfully seized. And I quote it only to show that the ground taken was, that as the party was entitled to an action covenant before eviction, he was entitled under the same circumstances to set up the breach of covenant by way of defence. And I take it that the converse of the proposition would hold good. A party cannot avail himself of such a defence, until the covenant is broken, and as soon as the covenant is broken, he is entitled to an action. And if he can prove a breach of covenant in one case by showing a title paramount in another person, without eviction, he can in the other. The principal in both is precisely the same.

In the case of *Sumter vs. Welsh*, (2 Bay, 558,) the action was for the purchase money, and the warranty was the same as in the case now under consideration, yet, the Court allowed the defendant to show a title paramount in another person, although there had been no eviction.

In the case of *Mitchell and Vaughan*, which was an action of the same description, the same defence was allowed, although resisted on the same ground that the action now is. Since that time the cases have been numerous. They have indeed passed without opposition, because the law was thought to be too firmly established to be questioned. And if we are to set afloat decisions which have been solemnly made, and which have been universally acquiesced in for fifteen years, we shall never know when to consider the law as settled. These decisions are entitled to more than ordinary respect on account of the extensive class of cases which they embrace.

The most of the deeds now drawn in this state are according to the form prescribed by the act of 1794, in which the covenant is in the same words as in the deed now before us, and this sort of defence is of such frequent occurrence, and that without any regard to the particular nature of the covenant contained in the deed, that it may be considered as one of our best settled rules of law and practice: Indeed, it is a principle so deeply ingrafted into the body of our law, that to extirpate it, would be attended with mischief, little less than the abolition of the first rule of evidence.

I am of opinion, therefore, that the nonsuit ought to be set aside.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

Blanding, for the motion.

Mayrant, contra.

RICHARD FURMAN vs. JACOB ELMORE.

IN the Constitutional Court of Appeals, at Charleston, January, 1812.
Motion to set aside the verdict obtained by the defendant, and for a new trial.

Assumpsit tried in Sumter district, before the late Mr. Justice *Wilds*.

The material circumstances of the case are stated in the opinion of the Court.

In November, 1807, the motion was argued at Columbia, by *K. L. Simons*, for the plaintiff, and *Richardson*, for the defendant.

It was again argued by the same counsel, at Charleston, by consent of parties, in January, 1812.

Simons, in support of the motion, stated and commented on the English doctrine of warranty, and the rule of compensation in case of eviction, and cited 1 *Reeves' Hist. of Eng. Law* 448. *Co. Litt.* 366. (*a.*) *Hargraves' notes*, 2 *Blk. Com.* 299. Warranty was incidental to homage, and was compulsory on the lord. The statute of *Quia Emptores* required an express warranty. The practice of subinfeudation was abolished by that statute. (*Flureau vs. Thornhill*, 2 *Blk. Rep.* 1078.) No damages were recoverable for the goodness of a bargain supposed to be lost. The money paid with interest and costs was all that was recoverable, unless where there was fraud. The same doctrine has been recognized in the state of Massachusetts. (*Marston vs. Hobbs*, 2 *Mass. T. R.* 433, 439.) Where there has been a breach of covenant without eviction, the rule equally applies. (3 *New York T. R.* 113; *Staats vs. TenEyck's Exors.*) Chattels and lands are subject to the same rule. (*Pitcher vs. Livingston*, 4 *John.* 1. 4 *Dall.* 441, 439.) The improved value at the time of eviction cannot be the rule; but the value at the time of warranty. (22 *Vin. Abr.* 427. 4 *Co.* 121.) The Civil Law rule is not binding on us. The Virginia Law agrees with the English. (1 *Henn. & Munf.* 202.) The Law of Connecticut varies. (*Kirb.* 3, *Swift's Syst.* 138.) Decisions of the Courts of this state (1 *Bay* 263) are not authoritative, and ought to be revised. (1 *T. R.* 5, *Poelnitz ads. Corbett*, *Domat* 77, &c. 81.) The Civil Law rule does not extend to this case.

Richardson, contra. The feudal doctrine of *ex cambium* and all its inconvenient consequences has been exploded. (2 *Blk. Com.* 299.) Covenants concerning lands are personal, and satisfaction is due for a false warranty. (2 *Mass. T. R.* 433. 2 *Blk. Rep.* 1078. *Kirb. Rep.* *Gore vs. Brasier*, 3 *Mass. T. R.* 543.) The recompence ought to be proportional to the injury or loss. *Domat* 79, lays down the true moral rule, also *Liber et ux. vs. Parsons*, 1 *Bay's Rep.* 19. *Chambers vs. Griffiths*, 1 *Esp. Rep.* 152.

Mr. Justice *Brevard* delivered his opinion as follows:

This was an action of assumpsit to recover sixty-two pounds five shillings sterling and interest upon a promissory note of hand, made by the plaintiff and payable to the defendant, being part of the consideration for three several tracts of land sold by Josiah Furman, deceased, to the defendant.

Josiah Furman, the plaintiff's brother, bargained and sold the said lands to the defendant, to whom he gave a bond for a considerable sum

of money, with a condition underwritten to make titles, particularly describing the several tracts, but never executed the titles according to such condition.

After his death, the plaintiff and Mrs. Haynesworth, the daughter of the deceased, together with her husband, Henry Haynesworth, executed titles to the defendant to the said lands, as his heirs at law: And the note, on which this action was brought, was given sometime afterwards in part consideration of the same lands.

The general issue was pleaded to the action, and notice given, according to the Act of Assembly, "for allowing of discounts," (1759. See *Public Laws* 246, 1 *Brev. Dig.* 237,) that at the trial a deficiency in the quantity of the land sold and conveyed, of seven hundred acres, would be insisted on by way of discount.

At the trial a deficiency of five hundred and twenty-four acres was proved; occasioned by a prior conveyance from Mr. and Mrs. Haynesworth, to Mr. — Newton, of that quantity of acres which was included in the conveyance to the defendant, being part of one of the three tracts conveyed to him by the defendant, and Mr. and Mrs. Haynesworth for thirteen hundred acres, granted by the state to the aforesaid Josiah Furman.

On the part of the defendant, it was contended, that a reasonable deduction ought to be made from the consideration of the whole land sold, equivalent to the value of the land lost by the failure of title. It was not contended, that the whole contract ought to be rescinded in consequence of that partial failure.

The principal point in dispute was concerning the rule of law by which the discount was to be governed, and a standard by which a compensation for the deficiency of the land was to be measured.

The witnesses who gave evidence in relation to the value of the parcel of land taken off by the prior conveyance, disagreed in their testimony. One of them said it was worth from three quarters of a dollar to three dollars per acre. Others said it was worth from one shilling and six pence to three shillings and six pence per acre. They all concurred, however, in saying there was a bay and several ponds on the land, and that the same was not valuable but for the timber trees growing on it.

A verdict was found for the defendant, for one hundred and twenty dollars.

This sum, added to the principal and interest of the note of hand, on which the action was brought, and which is extinguished by the verdict, amounts to upwards of five hundred and seventy dollars; which is said to be a sum somewhat exceeding that which was the consideration agreed on for the purchase of the whole tract of thirteen hundred acres: And although the value of lands of this sort, may have increased in value since the sale, it has not been pretended, that the lands in question have been improved at the expense of the defendant.

For the plaintiff it was insisted, that it was not competent for the Jury, upon any correct rule of law, to allow for the deficiency more than the price given, for the land deficient, or its relative value, at the time of the sale.

On the contrary, it was contended for the defendant, that the just rule of compensation, for a loss of this sort, must be the value of the thing lost at the time of proving the loss, and awarding compensation.

On the argument in support of the motion in this Court, for a new trial, it was objected, that no discount was legally admissible. The discount could only be claimed, it was said, upon the ground of a right to recover damages for a breach of covenant, either in the bond of Josiah Furman or the deed of conveyance from his heirs; and that his breach of covenant (if any existed) could not be set off against the plaintiff, in an action of assumpsit on a note of hand. And it has been further objected, that admitting the propriety of such a discount in general, yet no discount ought to be made in this case, as it did not appear, that the plaintiff's deed of conveyance contained a *covenant of seisin*, nor that the defendant had been evicted, or even disturbed in his possession, or any attempt to take possession of the land in question.

To the first of these objections the same answer may be given, which was given to a similar objection, in the cases of *Sumter vs. Welsh* and *Vaughan vs. Mitchell*, determined in the Court in November, 1806.

It was said that our discount law is more extensive than the English statutes of set-off, (2 Geo. 2, and 8 Geo. 2,) and not only allows the defendant to give in evidence, by way of discount, any cause, matter, or thing (having respect to the cause of action) but makes it lawful if the plaintiff is found to be indebted to the defendant, for the defendant to enter up judgment for the sum due, with costs of suit. That a contract to transfer titles to lands and warrant the same, and a contract to pay the consideration money, for such transfer or warranty, is in fact but one contract, the one being in consideration of the other, and therefore there is no impropriety or inconvenience in permitting the breach of contract on one side from being set-off against a failure of performance on the other side.

The objection to the right of the purchaser of lands to a discount, against the claim of the seller for the consideration money, on the ground of a failure of title, before a legal eviction, was also made in the cases of *Sumter vs. Welsh*, and *Vaughan vs. Mitchell*, and overruled.

In the case of *Vaughan vs. Mitchell*, it was objected, that the title to the land could not be tried in a collateral way, upon a notice of discount.

The Court overruled this objection, and said, that the act which declares, that no claim to lands shall be valid which is not made by a suit at law, (*Limitation Act*, 1712,) was not intended to forbid any other method than that, by action of ejectment to determine contested

claims to land, or contracts concerning land, but only to put a stop to the practice of entering on land and taking possession thereof, by the mere act of the claimant himself.

In the case of *Sumner vs. Welch*, it was objected that the discount was not supported by any evidence of a lawful eviction, by an action at law, in which way alone, it was contended, the plaintiff could be rendered liable upon the covenants contained in the deed of conveyance from him to the defendant. In that case too, the deed did not contain an express covenant of seisin; but it contained a general warranty of title.

To support the objection the case of *Pringle vs. the Exors. of Witten*, (1 Bay's Rep. 254) was relied upon.

But it was the opinion of a majority of the Court, that a conveyance in fee-simple, for a valuable consideration, together with a warranty on the part of the grantor to defend the premises for ever against every person whomsoever, as well as his own heirs, is equivalent to an express covenant of seisin.

The law, it was said, would operate great hardship and injustice if, after a bargain and sale of lands in fee-simple by one pretending to have a good title and lawful authority to sell and convey, it should appear that he had not a sufficient title or authority to sell, and the purchaser should be without a remedy unless he should be ejected by a recovery at law, which might not happen during his life; and therefore it was considered that a just construction of the deed of bargain and sale, or lease and release, containing the usual warranty of title without any express covenant of seisin, will render the vendor responsible for a failure of title as effectually as if an express covenant of seisin were inserted.

The opinion which was delivered as the opinion of a majority of the Court, (Waies, Bay, Brevard, and Wilds—Mr. Justice Trezevant dissenting,) noticed the distinction between covenants of seisin and covenants for quiet enjoyment. The case of *Hayes vs. Bickerstaff*, (Vaugh. 118,) referred to in support of the decision of the case of *Pringle vs. the Exors. of Witten*, was a case of covenant for quiet enjoyment; and it was held, that for the tortious entry of a stranger, the covenantor was not answerable, because he had a plain remedy against the wrongdoer, and it would be very unreasonable to infer a warranty of peaceable enjoyment against the tortious act of strangers.

Numerous authorities might be cited to show, that in covenant for quiet enjoyment, the plaintiff must state by way of breach, and prove that he has been evicted by some person having a better title. (1 H. Blk. 34. 4 D. & E. 617. 3 D. & E. 584. 1 Pow. on Contracts 378. Cro. Eliz. 212. Cro. Jac. 425, &c.)

But the reasons, on which this rule is founded, which are very obvious and cogent, do not seem to apply to a case like that under consideration. Even in an action for quiet enjoyment, if the disturbance proceeds from the covenantor himself, and not from a stranger, it is not

necessary to state or prove a lawful eviction. (1 D. & E. 671. 2 Show. 425. Cro. Eliz. 214.)

The general principles of law seem to favor the doctrine laid down in the case of *Sumter vs. Welsh*, though it must be confessed, that the doctrine of the English Law, on the point in question, is directly against it.

In *Bradshaw's case*, (9 Co. 60. 2 Co. 72, b.) in a covenant contained in a lease, which stated, that the lessor had full power and lawful authority to demise, the declaration was objected to, because it did not state what person had right, title, &c. at the time of the demise, but only that *Bradshaw* had not; but it was held sufficient.

Grants are to be construed strongly against the grantor, or covenantor. Upon a lease for years by words *demise* or *grant*, without any express covenant for quietly enjoying, the law will intend a covenant by inference, on the part of the lessor, that the lessee shall quietly hold, &c. (Cro. Eliz. 674. Fitz. N. Brev. 432. 1 Esp. Dig. 266.)

And in *Noke's case*, (4 Co. 80. Carth. 98.) it is said the same words import a covenant in law, on the part of the lessor, that he has a good title.

It may be said, that there is a distinction between leases for years and conveyances in fee, and that the lessor stands on the same ground as a vendor of a personal chattel, who is always understood to warrant the title of the thing sold. (1 Salk. 210. 1 Lord Raym. 593. 2 Lord Raym. 1182. 3 D. & E. 58. 3 Esp. Rep. 83.) It may be so, but the reason of the distinction is not clear.

Indeed there seems to be very little reason, if any, why there should be any distinction made in the warranty arising by implication of law, in the transfer of real and personal property, especially in relation to the title. It cannot well be presumed, that the seller does not undertake to convey a good title, and that he has of course, at the time of bargaining and conveying, lawful authority to sell; and that he has seisin or possession of the land, without which he would have no authority to sell and convey.

This is generally the understanding of parties in contracts of bargain and sale of lands in this country, and few purchasers, I believe, have any idea of the importance of a covenant of seisin, as laid down in the English authorities.

It may also be remarked, that a statute law of this state, passed in the year, 1795, with the express intent "to facilitate the conveyance of real estates," prescribes the form of a conveyance by way of release, as effectual to pass the fee-simple of land, which form contains nothing like a covenant of seisin. If it were considered as essential to guard the rights of a fair purchaser, or if the legislature did not intend to dispense with it, as unnecessary or superfluous, is it reasonable to presume, it would have been omitted?

The doctrine of warranty effecting landed property, however abstruse it may appear at the first view of the ancient English authorities, in

relation to the point in question, is, I confess now clearly established. This doctrine seems also to have been recognized as the settled doctrine in several of the most enlightened of our sister states. (*Co. Litt.* 365. 2 *Caines Rep.* 188. 1 *Mass. Rep.* 464. 4 *Cranch* 430. 3 *John. Rep.* 471. 5 *John.* 120.)

According to this doctrine, unless the vendor covenant, that he is lawfully seised, and has good right and lawful authority to sell, no action can be maintained against him, before eviction: And a covenant of seisin cannot be implied from a general or special warranty of title.— (*2 Bos. & Pull.* 13. *Doug.* 654.)

It is however clear, that this doctrine is of feudal extraction, and therefore not entitled to our highest veneration. In tracing the origin of the doctrine to the obligation of the lord to defend the title of his tenant, and in case of eviction to accommodate him with another seif of equal value, we meet with a doubt of some importance, namely, whether he was bound to do this upon *investiture alone*, without an express promise to that effect. (*Co. Litt.* 365, in a note by *Butler.*) The better opinion seems to be that he was. Yet it does not appear, that the tenant had any redress for a defect of title before eviction, or disturbance of his possession except upon an express covenant of seisin or quiet enjoyment. But a warrantee, or his heirs, might at any time before they were impleaded for the land, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor and his heirs, which bound all his lands by descent from the ancestor warranting.— (*Bac. Abr. Tit. Warranty.*)

If adjudged cases are to be considered as settling the law, then our law is established somewhat differently from that which has just been stated; and all covenants of warranty must be regarded as personal covenants, for the breach of which damages are recoverable as in other contracts; and an action will lie for damages for an implied covenant of seisin upon a deed of conveyance containing only the usual warranty of title.

In the case of *Champneys vs. Johnson*, determined in Charleston, in January, 1809, the duty was assigned to me to deliver the opinion of the whole court. The action was debt on a bond, given to secure the payment of a sum of money being the consideration of a tract of land; and the defendant claimed a rescision of the contract on the ground of a total failure of title. On that occasion the opinion delivered, so far as it concerned the question now under review, seemed to be consented to by the whole Court, and was to this effect: "That with respect to the question, whether the operation of a contract may be avoided in whole or in part, on the ground of an implied warranty on the part of the grantor or bargainer, if it were to depend on the law of England, no such warranty could be raised; for by the law of England, implied warranties can only arise from the known usages of trade, where both parties are presumed to have engaged on such terms, or where the vendor of a chattel undertakes to sell as having a good title, &c. But as to the soundness or sufficiency, qualities or qualifications of the sub-

ject of sale, no warranty is ever implied. If any deceit is practiced by the seller, it will be equivalent to an express warranty; but if there is no unfairness in the transaction, and both parties have an equal opportunity of ascertaining the true situation, condition and qualities of the subject of sale, and either or both should be mistaken, the maxim *caveat emptor* inflexibly applies, and the purchaser is considered as suffering by his own neglect, in not having taken care to secure himself by an express warranty. (*Doug.* 20. 2 *East* 314. *Cro. Jac.* 474. 2 *Blk. Com.* 452.)

The same observation may apply to the neglect of inserting a covenant of seisin in a deed of conveyance of lands in fee.

"Mr. Wooddson, (2 *Vol. Lect.* 415,) and Mr. Powell, (1 *Powell on Contracts* 150. See 1 *Fonbl.* 113. 1 *Lofft's Gilb.* 191,) have indeed laid down a different doctrine, and seem to have adopted the broad and liberal rule of the civil law, which raises an implied warranty from the fairness and fullness of the price paid, upon this clear and reasonable ground, that, in the contract of sale, the buyer is not supposed to part with his money; but in expectation of an adequate advantage or recompence. No authority however is cited in support of this doctrine, which is contradicted by an uniform current of decisions in the English Courts. These decisions go to establish this doctrine: That in the contract of sale, there must be either an *express warranty* or *deceit*, to entitle the vendee to redress, in case of unsoundness or defect. It may be doubted whether this established doctrine of English Law ever was received and adopted in this state; but if it was, it has been long since repudiated and exploded. I am unable to say how, or by what authority the more liberal rule of the civil law has been introduced; but certain it is, that it has long prevailed, and has constantly received the acquiescence and approbation of the bar, and the community in general.*"

These observations apply equally to the covenant of seisin, which has never been considered as essential in our courts to authorize a remedy by action or discount, where the purchaser has not been evicted. The rule of the civil law which implied a warranty *in every sale*, in respect to the title of the vendor, (2 *Blk. Com.* 452. *Cro. Jac.* 474.) has been constantly applied as raising an implied covenant of seisin without opposition or murmur. I have not been able however to trace the origin of its adoption, nor find the authority on which that adoption was founded. But I can confidently say, that it has been generally considered as settled law ever since I have known any thing of the principles and practice of the law, that is to say, upwards of twenty years: And I do not know that it was ever disputed or denied, till of late.

As in questions of property, *certainty* is of incalculable importance, I am not prepared to say, that the determinations which have taken

* See Justinian's Inst. by Cooper 272, and Note, p. 615. Dig. 2. 14. 7. 7. Dig. 21. 2. 70. &c. The value is to be considered at the time of eviction. Dig. 19. 1. 45.

place, though they may be traced up to an erroneous source, ought now to be departed from. I believe there will be more benefit derived from adhering to them, than by overturning them. Where a rule of law is firmly established, though on mistaken principles, and no greater evil is to be apprehended from an adherence to it, than may be expected from a departure from it, I shall always be an advocate for the rule *stare decisis*.

To legitimate the doctrine which has obtained, I would support it upon a presumption, which certainly would be extravagant in this instance, but which Lord *Coke* somewhere recommends as necessary and proper in support of right and furtherance of justice, that a legislative act *once* passed to authorize it, which cannot *now* be found.

In the case of *Johnson vs. Nixon*, decided in this court in November, 1811, the same rule, which had always before been conformed to, was recognized. The action was on a promissory note, to which a discount was opposed, on the ground, that the note was given in consideration of land purchased from the plaintiff, and that the title was insufficient. The title was not, I believe, examined to see whether it contained a covenant of seisin. That circumstance was not regarded as material; and my brother *Nott*, who declared the opinion of the whole court, laid it down clearly, that the defendant was entitled to the discount claimed, though he had not been evicted or disturbed in his possession, as it was manifest, that the plaintiff had sold and warranted a title to land which he himself had not a good legal title to or lawful authority to sell.

Upon the same principles, upon which that case was decided, if they are to be regarded as correct, must the exceptions to the verdict in this case, which are now the subject of examination, be disposed of? A discount, by our law, may be considered as a cross action, and subject to the same rules of law which would be applicable in an appropriate action to recover the discount insisted on. Where money is demandable by the terms of a contract, and suit is brought to recover it, the party entitled to a discount may oppose the plaintiff's recovery on the same ground on which he would be entitled to recover back the money, in case it had been paid pursuant to the express terms of the contract. Therefore, if it appeared on a trial of this cause, that the defendant was entitled to damages upon a false or mistaken warranty of title by the plaintiff, for which the note in question was part of the consideration, amounting to a covenant of seisin by construction and implication of law, those damages were a proper subject of set-off or discount, being damages arising from a breach of the same contract, upon which the claim of the plaintiff is founded.

Before I quit this part of the subject, I cannot forbear to remark, that from the research which I have been able to make, our courts seem to have carried the remedy for a defect or failure of title, in respect to lands, to an extent which is not warranted by the civil law, for by that law the buyer could not have recourse to the seller on his warranty, till he was evicted or troubled in his possession, though he

was bound to warrant the buyer against eviction. (*Domat L. 1 Tit. 2.*) The buyer might, immediately after eviction, or trouble, give notice of it to the seller, who became party to the action.

In France, where the rules of the civil law generally prevail, the buyer may give notice of the action against him to evict him, and bring his action on the warranty against the seller, before judgment of eviction, so that both actions may be decided at the same time. (*Pothier, Traite au Contrat de Vente, part 2, c. 1. Code Civil des Francais, L. 3, Tit. 6, c. 4. Co. Litt. 365. Butler's Note.*)

In a country like ours, the rule by which a compensation in damages is at once recoverable upon an implied breach of covenant, whether the party has or has not been evicted, seems to be the best that could be devised, although the introduction and establishment of it may be questioned, as savouring rather of legislative than judicial power.

I am the more reconciled to the doctrine which has been established with us, when I reflect that it is uniform, consistent, and harmonious in its application to both real and personal property. If any little incongruities should be found to exist, they may easily be made to yield to the force of general and uniform rules. A warranty is always implied where a man undertakes to sell a chattel as his own, and the remedy for the deceit or mistake is prompt and effectual. The same rule applies to sales of real estate.

If the title totally fails, or very materially, the contract may be rescinded or avoided *in toto*; otherwise damages may be recovered for the defect or partial failure. In some of the books it is stated as a reason why the seller of a personal chattel is liable on an implied warranty of title; that possession of a personal chattel is colour of title; (1 *Salk.* 210. *Bull. N. P.* 30,) but this is controverted by later authorities, and the action is held equally to lie, whether the seller is in or out of possession at the time of the sale. (3 *D. & E.* 58.) But possession of real property is as necessary and essential to the validity of the sale, as possession of personal property, and more so. (*Stat.* 32, *H.* 8, c. 9. *Vide Public Laws* 54. 2 *Blk. Com.* 2 *Wooddeson. Plowd.* 78. *Dyer* 74, 53. *Co. Litt.* 369, a.) Therefore the undertaking to sell and grant an estate in fee, necessarily assumes and affirms the right of possession as well as the right of property.

Having surmounted, with some difficulty, the exceptions to the verdict, founded on a supposed inadmissibility of the discount insisted on at the trial, I now approach the strong ground on which the plaintiff most confidently, and not without good reason, relies in support of the motion for a new trial.

The Judge who presided in the district court, it seems, in his instructions to the Jury, laid down the rule of compensation for the land deficient, to be the present value of the land so deficient, being taken off by the prior grant to Newton, and considered the proof of a better and adverse title existing in a third person, as equivalent to a lawful eviction.

The Jury, it is presumed, found a verdict in conformity to the direction of the court.

This rule of compensation has been objected to on several grounds; and certainly it must appear to be in many cases a most unreasonable and unjust rule. A tract of land which, at the time of sale, was worth only one hundred dollars, or which may have been sold for one fourth of its value, may at the time of eviction (or trial of the cause, in which the title is shown to be invalid) be proved to be worth fifty times as much. A change of times, or accidental circumstances may enhance or reduce the value of lands, without any exertion or expense on the part of the purchaser, and without any merit or fault of his. In such cases it would be hard to compel the seller to answer for the full value of property which has accidentally increased in price, or compel the buyer to receive only the diminished value which may have deteriorated by accidental causes, or sunk in value from the time he purchased.

A just standard of compensation ought not to vary with a change of times, nor rise and fall in consequence of fortuitous circumstances.

If the rule, as it was laid down, has been established by a uniform stream of decisions in this state, of sufficient magnitude and force to compel our acquiescence; and there is less danger to be expected from conforming to them than from departing from them, it would be better undoubtedly, to adhere to them.

That there is no statute law of this state, nor any authority derived from the laws of England to support the rule, is quite clear.

The common law rule is, the value of the subject of sale, at the time of the contract of sale, or the price or consideration paid, and interest thereon from that time, together with the costs of eviction, where the purchaser has been legally evicted. (1 *Reeves' History of English Law* 448. *Co. Litt.* 366. 2 *Blk. Com.* 299. 3 *Caines' Rep.* 111. 4 *Johns.* 1. 2 *Caines' Rep.* 192. 7 *Johns.* 258. 2 *Mass. Rep.* 433. 1 *Henn. & Munf.* 202. 2 *Henn. & Munf.* 164.)

This is the general rule. Where fraud has been practiced, relief may be had on that ground.

The bearing of this rule on particular cases would certainly be hard. A purchaser may expend large sums in valuable and permanent improvements on land purchased, which may be all swept away from him by the superior claimant, and yet he would be entitled to the money he paid for the land with interest and costs, and no more. I do not know how far a court of Equity, or even a court of law, might compel the real owner of land thus improved to compensate the innocent improver.

If there is no remedy for the evil, and it should be found to merit legislative attention, I have no doubt a remedy will be provided.

But the decisions of our own courts, it has been urged, for a series of years past, have established a rule different from that which obtains in England, and which may have obtained here prior to the revolution.

which has become a settled rule of property, that ought not now to be overthrown.

If this indeed were the case, I should feel the necessity of yielding a reluctant submission to the rule thus established, however strong might be my desire to preserve from violation and corruption those rules of law, which are venerable, not merely for their antiquity, but which have received the sanction of ages, the approbation of the learned and the wise; and whatever repugnance might arise from seeing them laid prostrate, sophisticated or even amended by any other than legislative authority.

But, let us examine those decisions, and see how far they are entitled to that reverence which is claimed for them, and what ought to be the extent of their controul. Let us see whether there has been such a train of concurrent adjudications, in number so many, pregnant with arguments so forcible, and sustained by authorities so respectable and pointed as to command our homage, and form a body of such weight and potency as to bear down and supplant a substantial ingredient in the solid fabric of the common law; a law which was received in this country at the dawn of its jurisprudence, as the palladium of our civil rights?

The cases to which we have been referred, and it is presumed that no others can be adduced, are three in number. The first is *Liber et ux. against the Executors of Parsons*, (1 Bay's Rep. 18,) tried in the year, 1785, before Mr. Justice *Pendleton*. This was an action for a breach of covenant, after eviction, on a deed of conveyance of a lot or parcel of land. The rule for the assessment of damages, was the point in dispute. The counsel of the defendants contended for the established rule of the common law. The plaintiff's counsel insisted, that "the true rule was the value of the property at the time of eviction, with interest from that time." Judge *Pendleton* is reported to have said, that there could be no doubt of the correctness of the rule contended for on the part of the plaintiffs; that purchases are always made with a view to the rise in the value of the thing purchased; and that the compensation ought to be according to the extent of the injury sustained.

Now, all this may be true, and the position laid down by the learned Judge, as indubitable, may, to men more enlightened than myself, appear perfectly clear, but to me it remains as questionable as if his opinion had never been delivered. In saying this I mean no reflection on Judge *Pendleton*, whose memory I highly respect. I say so, because I do not perceive in his opinion as reported, any argument of sufficient force to convince my mind, that it is well founded. I do not see by what deductions the position is established. It is laid down as an incontrovertible dogma, without even glancing at any authority to support it, unless the solitary work of a French civilian, quoted by the plaintiff's counsel, can be considered as entitled to that character.

But the rules of the civil law do not warrant the measure of damages

laid down, as an uniform standard. (*See Pothier on Obligations, part 1 No. 164. Poth. Traite du Contrat de Vente, No. 132, 141.*)

The next case is *Eveleigh vs. the Administrators of Stitt*, (1 Bay 92.) This was an action to recover damages on the eviction of certain chattels, and being a case under peculiar circumstances, the court left the question of damages to the discretion of the Jury, without laying down any specific rule; and the Jury found accordingly what they considered an equitable verdict, conformable to no certain standard. The case is reported to have been "a new one, and a kind of speculating contract, out of the usual course of things; without consideration passing from the buyers to the sellers, and without any view to the use and labour of the negroes;" and moreover, that it was one "which was likely to fall extremely hard on *Burke*, the only ostensible party in the transaction, &c." Under such circumstances, to be sure, it is no great wonder if the plaintiff did not recover the full value of the property, for which he had given nothing: but it may be questioned whether, "the case being a new one, and likely to fall hard on a particular person," afforded sufficient ground for excepting it from the operation of the general rule, which is said to have been recognized by it, as established in the case of *Liber et ux. vs. the Executors of Parsons*.

Be that however as it may, it does not appear, that the latter decision sheds any light on the former, or communicates any vigor to it. All that can be collected from it, is, that whatever the general rule of law on the subject, might be conceived to have been, the court did not feel itself bound by it on that occasion, and therefore rejected it as inapplicable to that case.

The next is the case of the *Executors of Guerard vs. Rivers*, (1 Bay 265.) This was an action of covenant, on a deed of conveyance of land, after eviction, decided in the year 1792.

The only question was the measure of damages. Mr. Justice *Grimke* was for adhering to the established rule of the common law. Mr. Justice *Waties* was of opinion, "that the value of the land lost by eviction, at the time of eviction, was the best general rule for the government of Juries, in cases of this nature; but that in special cases, the Jury might make the consideration money and interest the rule of compensation."

The opinion of Mr. Justice *Bay* was, "that the case of *Liber et ux. vs. the Executors of Parsons*, had settled the law on very just and legal principles. That the case of *Stitt vs. Eveleigh*, was an exception from the rule which had been settled, authorized by peculiar circumstances, in which the Jury had exercised a proper discretion, which had been acquiesced in by the parties."

Now, there seems to be nothing in these opinions, independent of their being the opinions of respectable judges, to strengthen the decision of Judge *Pendleton*, in the case before mentioned. They furnish no data by which their legal merits may be tested. The position of Judge *Pendleton* stands on the naked basis on which he placed it. unclothed

with even a *rag* of authority, and unsupported by any consequent reasoning.

The opinion of Judge *Watts* goes rather to shake and subvert, than to strengthen and affirm it. He agrees that it may be the best general rule; but that in special cases it may be departed from. If the rule is to be thus qualified, all its rigid fibres would soon dissolve like wax and its energy be destroyed. It would quickly be drowned in the multitude of *exceptions*, which would be made to it, unless indeed the "special cases" which ought to be considered as exceptions, could be accurately defined, so that they might be easily distinguished, and the reasons for excepting them clearly seen. But if this cannot be done, it would be better to leave the rule as it has been transmitted to us, than by fancied improvements and crude amendments, to adulterate and spoil it.

From all these considerations, I have stated, and many more which might be mentioned, if it were necessary, I am clearly of opinion, that the only legal standard of damages or compensation, in a case like the present, is that rule which was established in England, at the time when the common law of that country was adopted in this, and that it has always remained the same: And further that the judiciary of this country have pot, and never had any right or authority to substitute any other.

I shall not undertake to say to what point it might be wise in the legislature to change or amend the rule; and whether it might not be better to adopt the rules of the Civil Law in relation to this subject. I am however prepared to say decisively, that the rules of the Civil Law, as they were established in the *Roman Empire*, in the time of *Justinian* or as they prevail at this day in France, or any other country in Europe, are no ways binding on us, unless they have been incorporated in our code, and are part of the known and established laws of the land. Yet I think very highly of the Civil Law; so far as I am acquainted with it, it appears to me to be a most admirable and excellent system of rules, founded on the most solid and durable principles of jurisprudence and pure morality.

But if the Civil Law were to be our guide in the case now to be decided, it is by no means clear that the verdict ought to stand.

By the Civil Law, as it prevails in France, the seller is bound to refund to the buyer on eviction, the original price, and also the increased value of the lands, together with the expenses of the improvements made. But this rule is qualified by the intention of the parties.

In case of an immense augmentation in the price of land, or value of the improvements, the seller is only bound to answer for such moderate damages as the parties might be supposed to have anticipated when the contract was entered into. (*Pothier, Traite du Contrat de vente*, No. 132, 141.) The seller is not bound to restore the price paid, if the buyer knew at the time of the sale, the danger of eviction. If the buyer has derived a profit from the deterioration of the property, while

in his possession, the seller shall be entitled to retain of the price received, a sum equivalent to that profit. And the seller must reimburse the buyer all reparations and ameliorations made upon the land, or cause it to be done by the party who shall evict him. (*Code Civil des Français*, L 3, Tit. 6, c. 4.)

Where no fraud is imputed to the party to perform the obligation, damages are not to be assessed above the value of the thing sold; and is not liable for a rise in the price or value of the thing. (*Pothier on Obligations*, No. 164, 165.)

If the value of the thing diminishes before eviction the seller has the advantage of it.

According to our law, the principle upon which a claim to damages is founded in a case like the present, being the breach of an implied covenant of seisin, the violation of the contract must be coeval with the date of the contract, and therefore cannot be extended to embrace causes arising afterwards. It is for this reason the increased or diminished value of the subject of the contract cannot be admitted to enhance or reduce the *quantum* of compensation.

If the claim was founded on a warranty of title, or covenant to warrant, after eviction, then indeed there might be room to contend, that the compensation ought to be adequate to the real injury sustained in consequence of the eviction, and ought not to be restrained to the price paid and interest. I am not however prepared to say, that a different rule could be applied in that case, but I am clear, that it would be well if a different rule could be applied, especially where valuable improvements have been made by the purchaser on the land, or where it has been deteriorated by his use of it.

On questions such as those which are involved in the present case, where the law is somewhat uncertain, the responsibility which attaches to the magistrate who is in any degree influential in settling it, is a matter of serious concern. The anxiety which this reflection has produced in my mind, must be my apology for the enormous length and prolixity of this opinion, the result of which is, that the motion ought to be granted and a new trial awarded.

In the application of the rule which has been laid down, for the damages to be assessed in a case like the present, a difficulty may occur in ascertaining the amount of the sum to be refunded with interest. In the present case, three tracts of land were purchased, as forming one entire body of land, and a gross sum agreed on by way of consideration. There was no specification of the separate value of each distinct parcel, nor can it be known what was the estimated value of the part lost by the grant to Newton, at the time of the sale to the defendant. This being the case, it must follow necessarily, that the price given for it must be ascertained by an average estimate of the whole land bought, formed from a comparison with the gross amount of the price agreed to be given for it. (*But see Briggs vs. Peay*, ante 184.)

This perhaps ought not to be the rule where the land lost is of unequal value with the land for which the title has not failed; but where the part lost and the part preserved are of the same or nearly the same average value, the best rule appears to me, that which I have suggested. In case the land lost should be proved to be considerably inferior or superior in value, at the time of the sale, to the rest of the land bought at the same time, or to be very unequal in their average value, then a better rule would be to leave it to the Jury to assess the value at the time of the contract, being guided in their assessment by the price or consideration given for the whole of the land purchased. (*See 5 John. 49. 2 Henn. & Munf. 164.*)

Justices *Grimke, Brevard, Nott, and Colcock*, present.

Justices *Bay and Smith* absent.

Note 1.—See 7 John. 258, *Kent vs. Welch*. (Citing 2 Caines R. 188. 1 T. R. 584. Cro. Eliz. 914. Cro. Jac. 425. 2 John. R. 1. Selw. N. P. 413. 4 Co. 80.) 2 Binney, 49, *Henry vs. Morgan*. 7 Pothier on Obligation, n. 164, Part 1, n. 165. 4 John. 1, *Pitcher vs. Livingston*. 3 Caines 111, *Staats vs. TanEyck*. 1 Ersk. 206. 1 Kaime's Equ. 284. 2 John. 484. Co. Litt. 193, 32, a. 2 Saund. 45, *note*. 5 John. 49, *Morris vs. Phelps*. 2 Esp. Ca. 639. 5 John. 120, *Kortz vs. Carpenter*. 3 John. 471. 8 Co. 89, b. 1 Com. Rep. 228. 1 H. Blk. 17. 4 Dall. 436. Co. Litt. 384, n. 1 Fonbl. 366. 2 Blk. Rep. 1078.

Note 2.—See Doug. 654. *Bree vs. Holbeck*; *Admor. cum testam. anno*. found a forged mortgage among testator's papers and sold and assigned *bona fide*. It was held no fraud. The assignor, it was said, did not covenant for the goodness of the title. The plaintiff should have looked to that. [*The above case is from 4 Vol. Judge Brevard's MS. Rep. 51. R.*]



ROBERT W—— and Wife *vs.* E. L——, Carpenter.

To say of a woman, "I caught Lucy W—— in bed with Ephraim M——" is not actionable. Words charging a woman with a breach of chastity, are not actionable, unless special damages be proven.

TRIED before Mr. Justice *Richardson*, at Newberry, March Term, 1819.

This was an action of slander on the following words: "I caught Lucy W—— in bed with Ephraim L——." To which the defendant demurred generally. And the Court sustained the demurrer; from which decision the plaintiffs appealed, and moved to set aside the judgement

on demurrer, and for leave to execute a writ of enquiry on the ground, that the words are actionable.

Mr. Justice *Richardson* delivered the opinion of the Court.

The only question is, whether words charging a woman with a breach of chastity, are actionable? That they are not actionable, without special damage following, has been long since settled, in the case of *Boyd vs. Brent*. See also cases of *Buys vs. Gillespie*, 2 *John*. 115. *Brooker vs. Coffin*, 5 *John*. 188.

To such decisions, I will barely add, that this is one of those decisions, springing from Common Law doctrines often complained of, but now requiring legislative aid to remedy after inveterate practice.

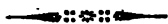
The motion is therefore unavoidably dismissed.

Justices *Colcock*, *Nott* and *Johnson*, concurred.

Mr. Justice *Gantt* dissented.

O'Neal, for the motion.

Bauskett, contra.



CATHARINE BATES vs. JOHN QUATTLEBOM.

A. Brought an action against B. for the conversion of a quantity of cotton, and obtained a verdict; and afterwards commenced another action for the conversion of a part of the same cotton, *Held*, that the former recovery was a good plea in bar to the second action.

TRIED before Mr. Justice *Johnson*, at Lexington, October, 1819.

This was a Summary Process, brought to recover the value of some cotton, charged to be the property of the plaintiff, which the defendant had converted to his own use.

The defendant pleaded a former recovery in bar, and produced the record of a special action on the case, in which it was alleged that the plaintiff had carried a large quantity of cotton to the defendant's machine to be picked and packed, and that by his negligence, it had been burnt

and destroyed, in which the plaintiff had a verdict for a large sum.

The plaintiff admitted that this action was brought for part of the same cotton, but offered to prove that before the cotton was burnt, the defendant had taken from it his toll for picking and packing, and insisted that the plaintiff was entitled to recover the value of the cotton so taken in this action, as the defendant was not entitled to toll, as the cotton was not picked and packed.

The Court being of opinion that the former recovery was a bar to the present action, gave a decree for defendant.

A motion was made to set aside the decree, and for a new trial on the ground, that the plaintiff was not barred by the former recovery.

Mr. Justice *Johnson* delivered the opinion of the Court.

This case has been submitted without argument, and I am wholly unable to see any foundation for the present motion. In the first action, the plaintiff had a right, and doubtless did go for the whole quantity of cotton delivered, and if she did not, she was equally concluded, because she would not have been allowed to split up an entire cause of action into as many as she might think proper. The Jury who tried that cause, were bound to allow her the value of all the cotton delivered; and whether he was entitled to or did take his toll, was a matter of no consequence, for if they made the value of seed cotton the measure of damages, then he was entitled to no allowance, but if they made the value of cotton picked and packed, the standard, then a deduction ought to have been made for the expenses of picking and packing.

The motion must be refused.

Justices *Colcock*, *Nett*, *Gantt* and *Richardson*, concurred.

Butler & Butler, for the motion.

Stark, contra.

JAMES K. DOUGLASS & CO. vs. CHARLES SPEARS.

A memorandum signed by the defendant only, whereby he agreed to deliver a quantity of cotton, takes the case out of the statute of frauds, though not signed by the purchaser.—(a.)

THIS was an action of assumpsit, founded upon the following written memorandum :

“ I hereby engage to deliver J. K. Douglass & Co. seventy square bales of cotton, all in good order, ten days from this date, at Sumter’s landing, they allowing me twenty-five cents per pound, payable sixty days from date of delivery ; as many of the bags as are rent, I engage to have all mended before delivery, and if the sample sent does not meet Mr. Douglass’ approbation, this agreement is not considered as binding, only I am to have notice in two days from this date to that effect, this 28th March, 1817.

CHARLES SPEARS.”

The declaration alleged that the sample was approved of within the two days specified in the contract, of which the defendant had due notice, and the breach assigned, was that defendant had not delivered the cotton or any part of it. It appeared in evidence, that the plaintiff’s boat was ready to receive the cotton at the time specified, and that the plaintiffs had used all diligence to procure a delivery, first by sending a boat to receive it, and afterwards in sending waggons.

The cotton was weighed by the appointment of the defendant, and security which had been demanded by him, though not required by the agreement, had been tendered for the payment of the cotton.

It appeared further in evidence, that on the evening, previous to this contract being entered into, information had been received, that cotton had risen in Charleston two cents in the pound, but it did not appear by any positive testimony that plaintiffs were apprized of it, and the defendant, after the circumstance of the rise was communicated to him, observed that as the bargain was made, he hoped Mr. Douglass would derive profit from it.

The counsel for the plaintiffs in the argument of the case, insisted upon their right to recover the difference between the price agreed to be given for the cotton and the rise which had taken place.

For defendant it was argued, that the contract was not mutually binding at the time of its being entered into, and consequently the defendant had a right to refuse a compliance with it.

The Jury found for the plaintiffs \$436 26. When the verdict was handed in, it appeared from something which was said by the foreman, that they had allowed for wagon hire.—But as the declaration contained no charge of that kind, the Presiding Judge recommended to the Jury a reconsideration of their verdict, and to deduct what had been allowed on that account. The Jury returned a verdict diminished only by one cent.

Defendant moved in arrest of judgement on the following grounds, viz.

1st. That from the contract as set forth in the declaration of plaintiffs, they ought not to recover, in as much as the contract was not at the time of the signing and executing the same, as appears by the said declaration, and the copy of the contract endorsed thereon, mutually binding on each of the parties, and therefore not in law, a contract binding on the defendant to perform. And for the non-performance of which plaintiffs have no right to recover of the defendant.

2d. Because the agreement declared on is *nudum factum*, as there does not appear to have been mutual considerations on the part of the plaintiffs, and the defendant alone bound.

And if those grounds should not avail, it is moved that a new trial be granted on the following grounds :

1st. That the written instrument produced in evidence is not a contract binding on the defendant or upon which the plaintiffs can recover; not being mutually obligatory when entered into, and that the Presiding Judge mistook the law and misdirected the jury in saying to

them that it was a good contract in law on which the plaintiffs might recover.

2d. Because the Jury found damages for boat and wagon hire, although the plaintiff's declaration had no count on which such finding could be predicated, and it was not claimed by plaintiff's counsel; and neither the law, or facts of the case warranted the finding which is excessive and unlawful.

3d. Because the notice given of the approval of the sample of the cotton, by the plaintiffs was not in time, supposing the agreement was binding in law.

The opinion of the Court was delivered by Mr. Justice Gantt.

It is difficult to conceive, when reference is had to the contract entered into by the defendant in this case, how an opinion could be entertained that it was not mutually binding between the parties. It is a contract on the part of the defendant to deliver cotton at a certain time, to be paid for at a certain time and price, by the plaintiffs, with a condition annexed in favor of the plaintiffs, whereby they are not to be bound by the terms of it, should they disapprove of the sample of the cotton, which was sent for inspection. The contract is one *in presenti*, subject to this defeazance alone, on the part of the plaintiffs.

The sample of cotton, however, was approved of, and the defendant had notice within the prescribed period of two days, a fact averred in the declaration, and satisfactorily established in proof.

Is it supposed, that because both parties did not sign this written contract, that therefore it was not obligatory upon the one who did. The case of *Egerton vs. Mathews*, (6 East, 307,) answers the objection. There the action was brought upon the following memorandum in writing: "We agree to give Mr. Egerton 19d. per pound, for 30 bales of Smyrna cotton, customary allowance, cash three per cent. as soon as our certificate is complete."

(Signed)

"MATHEWS & TURNBULL."

It was there contended, that the contract being altogether executory, and no consideration appearing on the face of the writing for the promise, nor any mutuality in the engagement, it was void by the statute of frauds. Lord *Ellenborough* said "this was a memorandum of the bargain, or at least so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires." The first ground in arrest of judgment must fail.

On the second ground in arrest, it is almost unnecessary to say that this contract cannot be considered in the light of a *nudum pactum*.

Any degree of reciprocity will prevent the agreement from being considered in that light. Here the consideration was expressed, and considered by the defendant as the full value of the article which he contracted to deliver.

The objections in arrest of judgment being disposed of, the first ground taken for a new trial, and which is bottomed upon a supposed want of validity in the contract to bind the defendant, must fall with them.

In regard to the second ground for a new trial, that the Jury found damages for boat and waggon hire, this, at the utmost, is only conjectural. It does not appear by the verdict; and the observations made by the Court to the Jury, and the alteration of the verdict thereupon, afford ground to believe that no allowance was made for waggon hire.

They may have allowed, and probably did, damages on account of the demurrage of the boat, and this they had a right to do. Nor are the Court prepared to say in a case of this kind, where the party goes for general damages, that the Jury might not have taken into their consideration disappointment on account of the waggons which had been sent for the cotton.

The observations of the Presiding Judge grew out of the impulse of the moment, and were introduced *ex majori cautela*.

The evidence disproves the correctness of the third

ground taken, as it was beyond doubt express and satisfactory, that defendant had notice that the sample was approved of by Douglass within the two days.

The defendant therefore can take nothing by his motion, and this is the opinion of the Court.

Justices *Colcock*, *Johnson* and *Richardson*, concurred.

Levy, for the motion.

Blanding, contra.

(*d.*)—*Roget vs. Merritt*, & *Clap*, 2 *Caines' Rep.* 117.

R.

JAMES SWANZY vs. JAMES HUNT, Sheriff.

The sheriff is a mere ministerial officer, and is justifiable in serving a foreign attachment, though the defendant may have been in the state at the time the writ was issued.

No person can take advantage of a fraudulent deed, but creditors and purchasers; but the sheriff in attaching property of a debtor, in the possession of a third person, to whom it had been fraudulently conveyed, is considered as the lawfully authorized agent of the creditors.

TRIED before Mr. Justice *Richardson*, at Spartanburgh, Fall Term, 1819.

This was an action of trover to recover damages for two negroes and some other property levied on by the Sheriff, as the property of *John Brown*, by virtue of a foreign attachment.

It was proved that *Brown* made a deed of conveyance to the plaintiff for the said property, a few days before the attachment issued, and that the plaintiff gave his note for the payment. There was some evidence adduced to show that the defendant in attachment was within the state, when the attachment issued.

The Judge charged the Jury that if they believed the deed was made to defraud the creditors of *Brown*, the Sheriff was justified until the attachment was set aside by motion.

The defendant moved the Court of Appeals for a new trial.

1st. Because the Judge misdirected the Jury in stating that the Sheriff was justifiable, though the defendant in attachment was within the state when the attachment issued.

2d. Because the defendant in attachment was proved to be in the state when the attachment issued.

3d. Because the Sheriff could only justify himself even if the deed were fraudulent, by showing that he seized the property by a valid process, at the suit of an attaching creditor.

Mr. Justice *Richardson* delivered the opinion of the Court.

I need not narrate the evidence to show that the plaintiff colluded with *John Brown*, to cover his property from his creditors: It was abundant and satisfactory. But as none but creditors or purchasers could take advantage of the fraudulent conveyance made to the plaintiff of all *Brown's* personal property, it became necessary to show that the Sheriff was the lawfully authorized agent of the creditors. To prove that he was, the Writ of Attachment was given in evidence. A witness swore he believed *John Brown* was within the state at the time the attachment issued. And the sole question is, does the Attachment justify the sheriff, though *Brown* may have been within the state? There can be no doubt, but that upon full proof of the fact, the Attachment may be set aside upon the motion of the proper party; but until it be actually set aside, the officer of the Court must obey its formal mandate, though it may have been issued by mistake. This officer is ministerial, and his duty being written in the precept, he can have no discretion upon that point.

The distinction is between a *void* and a *voidable* writ. The former is a nullity, and can afford no justification. The latter is valid, and enforces obedience, until actually set aside by extrinsic testimony, and until then must be

obeyed. (*See 6 Bac. 692. 12 Mod. 178-9. 2 Jones, 114.*) Whom would you move to set it aside? The Judge and not the Jury surely; unless some issue of fact were made up for the express purpose; and then the Judge must decide the motion upon the fact found by the Jury. The Judge always decides upon the process, and the manner of it.

Suppose, for the purpose of the present suit, the Jury had considered the attachment a nullity, and had taken the negroes from the sheriff, and then the plaintiff in attachment had gone on, and still obtained a verdict on the writ of attachment (which assuredly he might still do, being no party to the present action, and which might well happen, as it could not appear on record that the former Jury held it void by their verdict in a different case, nor could we adjudicate their interest in this action,) what an inconsistency must then follow; the latter verdict would require the sheriff to produce the negroes, while the former would already have taken them from him.

The Sheriff is justified by a writ good upon its face, till the plaintiff shows his right of property, and in this he has failed.

The motion is refused.

Justices *Colcock, Nott, Gantt* and *Johnson*, concurred.

M' Duffie, for the motion.

Gist, contra.



JOHN SIMKINS, Ordinary, vs. JOHN POWERS.

No action will lie against an Administrator or his securities, until they have been cited to appear before the Ordinary, to account for the actings and doings of the administrator; and a decree of the Ordinary obtained thereupon.—(a.)

THIS was an action brought in the name of John Simkins, as Ordinary of Edgefield district, against the defendant, as surviving obligor on an administration bond.

The estate had not been finally settled up in the Ordinary's office, nor had any citation issued to call the defendant into that Court previous to the institution of this action on the bond.

The case was tried at Edgefield, March Term, 18—.

The Presiding Judge, (Mr. Justice *Gantt*) conceiving that the action was prematurely brought, in as much as there had been no decree of that Court for distribution, nonsuited the plaintiff.

The plaintiff has appealed for supposed illegality in the decision below.

Mr. Justice *Gantt* delivered the opinion of the Court.

By the act of March, 1789, for granting probates of wills and letters of administration, and other purposes, it is required, that on the appointment of an administrator and letters of administration, granted, he shall enter into bond with condition, among other things, "that he shall make a just and true account of his actings and doings when required by the said court, and all the rest of the said goods, chattels and credits which shall be found remaining upon the account of the said administration, *the same being first allowed by the said Court*, shall deliver and pay unto such persons respectively as are entitled to the same by law," &c. From this view of the law, it is obvious that the Court of Ordinary, and that alone, is the proper tribunal for the settlement of the affairs of the estate. And it is the duty of that Court in every case of default to cite the administrator before him, that the cause may be made to appear. If, after having done so, the administrator does not act in conformity with his duty as pointed out by law, the Ordinary in such case, may call in the aid of this Court to enforce obedience, by a suit upon the administration bond. A distributee is not entitled to a remedy by action upon the bond till distribution decreed; for until the estate is settled up, how can it appear what is the dividend to which he is entitled.

Were it otherwise, that the Court of Common Pleas

should exercise jurisdiction in cases of this nature where no return had been made in the Court of Ordinary, it will be seen at the first glance, that a whole term might be employed in investigating the affairs of an estate, and then have made but little progress. Such is not the law. Constituted for that special purpose, the Court of Ordinary must take cognizance of all matters relative to the affairs of the estate. All that is due to and payable from the estate is there to be accounted for by the administrator, and when a final adjustment is made, and the account closed, it is the duty of the Ordinary to decree distribution of what remains. What is it that the administrator is to deliver and pay over? I answer in the words of the act, that which has been first allowed by the Court of Ordinary. Nothing of this kind has been sanctioned by that Court, and for the want of it, we think the nonsuit below was legally awarded.

Justices *Colcock, Nott, Johnson and Richardson*, concurred.

Butler & Butler, for the motion.

M' Duffie, contra.

(*a.*)—Ordinary vs. Williams & Parkman, 1 Nott & M'Cord, 587. R.

CONSTITUTIONAL COURT

OF

South-Carolina, January Term, 1820—Charleston.

JUSTICES PRESENT THIS TERM.

ELIHU HALL BAY, RICHARD GANTT,
CHARLES J. COLCOCK, DAVID JOHNSON,
ABRAHAM NOTT, JOHN S. RICHARDSON,
 DANIEL E. HUGER.

STATE *vs.* DE LA FORET.

An ambassador or Public Minister of a foreign Prince or State, is not amenable to the laws of the nation to which he is sent.—(a.)

The Law of Nations does not exempt a foreign Consul from liability to the laws of the state in which he resides.—(b.)

The Federal Courts have not exclusive jurisdiction with regard to offences committed by foreign Consuls in the United States; but the Consul is amenable to the laws of the state in which he commits an offence.

THE defendant was indicted in the Circuit Court of Charleston, in January Term, 1816, for an assault and battery.

A plea to the jurisdiction of the Court, was interposed on the ground that he was the *French Consul*, and therefore not amenable to the laws of the state.

The plea was sustained by the Presiding Judge, and now a motion was made to reverse that decision.

Mr. Justice *Huger* delivered the opinion of the Court.

Two grounds have been taken in support of the plea :

1st. That a foreign Consul, by the law of nations, is

not subject to the laws of the state in which he resides—
And

2d. That if he be subject to the laws of the country in which he resides, the Federal Courts have exclusive jurisdiction under the constitution of the United States, over all cases in which he is concerned.

I shall examine these grounds in their order.

That an Ambassador, or public minister of a foreign Prince or State, is not amenable to the laws of the nation to which he is sent, is, I believe, universally admitted. All the writers on the Law of Nations concur in opinion as to the existence as well as the propriety of this immunity: And no Court in this country, either Federal or State, is known to have questioned its existence.

In *England*, as early as the 7th of Ann, a statute was passed, "exempting Ambassadors and public Ministers from the process of their Courts, and the statute declares all such persons as should prosecute any writ or process against them, to be violators of the Law of Nations;" and Congress, in 1790, passed an act of similar import; but neither of these acts extends to Consuls.

The privileges of Ambassadors and public ministers are great, but they appear to be necessary. They are the representatives of nations, employed in the transaction of the most important concerns, the proper management of which requires the most perfect exemption from all possible influence or control. But a Consul appears to be neither Ambassador nor public Minister. He is not the representative of his nation, nor is he employed in the management of national concerns. He is no more than a commercial agent, attending to individual interests. *Vattel*, (*in B. 2, C. 2, S. 34,*) speaking of Consuls, declares, "that they are not public Ministers, and cannot pretend to the privileges of one." *Barbeyrac*, *Binkershoek* and *Martens* declare them subject to the Laws of the country in which they reside. But *Vattel* appears to think that as a Consul holds the commission of his sovereign, he ought to be regarded as more under the Law of Nations than a com-

monstrous. He goes so far as to say, that a Consul's functions seem to require "that he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the law of nations, by some enormous misdemeanor." It is a mere suggestion, at variance with the opinions of all other writers on the subject; and with which he does not appear to be entirely satisfied himself. In B. 4. C. 6, Sec. 75, he proceeds, "we have spoken of Consuls in the article of *Commerce*. Formerly agents were a kind of public Ministers; but in the present increase and profusion of titles, this is given to mere commissioners appointed by Princes for their private affairs, and who not unfrequently are subjects of the country where they reside. They are not public ministers, and consequently not under the protection of the Law of Nations." He here classes Consuls with agents, to whom he denies the protection of the Law of Nations. In the case of *Viveash vs. Becker*, (3 Maule and Selwyn, 284,) Lord Ellenborough concludes a very full investigation of this question, with the opinion, that no such privilege exists. And the Chief Justice of Pennsylvania, in the case of *Kosloff* declares, "that he cannot hesitate in the opinion that there is nothing in the Law of nations which protects a Consul General from Indictment." We have indeed in the case of the *United States vs. Mr. Ravaia*, Consul from Genoa, the opinion of the then Chief Justice of the United States, Mr. Jay, whose diplomatic services and great learning entitle his opinion on this subject to great respect, "that Consuls are not protected by the Law of Nations from the jurisdiction of the Laws of the place where they reside." (2 Dal. 297.) I am therefore of opinion, that the plea cannot be sustained on the first ground.

The second ground presents great difficulties. The complex nature of our government, the union of several sovereignties under one, and yet each preserving a large proportion of independent sovereignty in itself; its recent establishment, which necessarily implies the absence of

much experience, that will, in the progress of events, explain the meaning of its different parts, and reconcile them in one harmonious whole, must frequently originate questions of great nicety. In the consideration of such questions, much caution ought to be observed. The great purposes for which our Governments were established, must be constantly kept in view ; and no narrow rules of construction be adopted, which shall check in their growth the protecting powers of the Federal Government.

To the State Governments, is committed the protection of all our domestic rights, on which depends almost the whole of private happiness. Here we have a field sufficiently ample to exhaust the powers of those, whose ambition it is to extend the bounds of human happiness ; here the greatest talents, and most exalted feelings may be indulged without the fear of wanting employment.

On the Federal Government is devolved the duty of national protection. To enable it to perform this duty, all the means of national defence are given ; the army, the navy, the militia, the power of taxation, the power of borrowing money, the power of defining and punishing piracies and felonies committed on the high seas, and offences against the Law of Nations, to declare war, &c. But protection is not the only duty devolved on the Federal Government, by the Constitution of the United States. It has power to regulate commerce ; to establish an uniform rule of naturalization, and uniform rules on the subject of bankruptcies. It has power to coin money, &c. to provide for the punishment of counterfeiting the securities and current coin of the United States ; to establish post-offices and post roads ; to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive rights to their respective writings and discoveries ; to constitute tribunals inferior to the Supreme Court ; to exercise exclusive legislation over such district as may be ceded to them. Here are powers, the exercise of which are necessary to national convenience, and it is difficult to ima-

gine how we should proceed without an exercise of these powers, or most of them, by the Federal Government. Were each state to regulate its commerce, (a fruitful source of war,) we should not present to foreign nations a single, but a divided front; and it does not require the spirit of prophecy to foresee that the exercise of such a power by the states, would soon lead to a dissolution of the union. We accordingly find in the 8th sec. of the 1st Art. of the Constitution of the United States, the states expressly prohibited from the exercise of this power; "To establish an uniform rule of naturalization and an uniform rule or law of bankruptcy:" The exercise of this power by the states would necessarily defeat the object of the constitution. There could not be an uniform system or rule, if twenty different governments had the power to legislate on the subject. It is not only the object of the Constitution to have an uniform rule, but public convenience would seem imperiously to require it. We are citizens of the United States, and not of the respective states, and foreign merchants trade with us, and foreign governments recognize us when trading with them, not as the citizens of a district or state, but as citizens of the United States. It would seem to follow that not only the rule of naturalization should be uniform, but that the law of Bankruptcy should be also uniform; and of this opinion were the Supreme Court of the United States in the case of *Sturges vs. Crowningshield*, (4 Wheaton 196.) The power of coining money is expressly given to the Federal Government and expressly taken away from the States. If this power had not been taken away expressly, I presume little doubt exists, that the States would have retained it, because an exercise of this power by the States would not have been inconsistent with an exercise of it by the Federal Government; nor would it have been more inconvenient to use the coin of different States than to use the coin of foreign powers.

What I have observed of the powers already noticed, will apply with equal force to all the powers enumerated

in the Constitution. Where powers are given exclusively to the Federal Government, or where expressly taken away from the States, the States cannot exercise them; or where the power given to the Federal Government, is inconsistent or incompatible with the exercise of that power by the States, the States are excluded. But when power is given to the Federal Government, and not expressly taken away from the States, and the exercise of such power by the States is not incompatible or inconsistent with the use of it by the Federal Government, the power is concurrent. The correctness of the rule, has, I believe, never been questioned. And why should a State be prevented the exercise of a power which is not expressly taken away from her? which is not exclusively given to the Federal Government, and the exercise of which power by the State, can lead to no inconvenience? Nay, where the exercise of that power, not only does not produce inconvenience to the citizens of the United States, but where the abandonment of it by the State would necessarily lead to great inconvenience, as in the case before the Court?

I shall now proceed to enquire if the Constitution of the United States has expressly granted to the Federal Government exclusive jurisdiction over Consuls, or if the exercise of jurisdiction in such cases by the States, is incompatible with the exercise of such power by the Federal Government.

It is no where expressly taken away from the States; if it therefore be not exclusively given to the Federal Government, or the exercise of it by the States, be not incompatible with the exercise of it by the Federal Government, I shall conclude, that the States have concurrent jurisdiction.

The words of the Constitution are "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made under their authority; to all cases affecting Ambassadors, other public Ministers and Consuls, in all cases of admiralty and mari-

time jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, &c." The words "Extend to all cases affecting Consuls," do not seem necessarily to imply, that the State Courts are excluded jurisdiction. But it is said, that in as much as the word *all* is prefixed "to cases in law and equity; to cases affecting Ambassadors; to cases of maritime and admiralty jurisdiction," and is not prefixed "to controversies to which the United States are a party; to controversies between two or more States, &c." the Constitution must have intended to give exclusive jurisdiction in the first, and only concurrent in the last. I cannot perceive, that the introduction of the word *all* has produced the smallest effect on the meaning of this section. Were it omitted altogether, or attached to every branch of the section, its meaning would be the same. "My estate" means all my estate, and "all my estate" can mean nothing more than my estate. I regard the word *all* as surplusage where it does occur, and of course unnecessary where it does not occur. But the invariable practice of our courts will furnish higher testimony of the incorrectness of the construction contended for, than verbal criticism can afford. It will be observed that the word *all* is prefixed to cases of admiralty and maritime jurisdiction, and yet the State Courts invariably sustain actions for seamen's wages. But can it be supposed that the Constitution intended to exclude the State Courts from all jurisdiction over Consuls, and yet meant to give them concurrent jurisdiction over controversies to which the United States were a party? or to controversies between two or more States? and yet this would be the case, if the construction contended for were to prevail.

As I am not satisfied to give to the word, *all*, in this section, the importance which has been attached to it, I shall proceed to enquire if the power now in question be one of those, the exercise of which by the States would be incompatible with the use of it by the Federal Government.

Should a Consul violate the Law of the United States, or the Constitution of the United States, or a Treaty made by the United States, he ought to be amenable to the Federal Courts, and so far has the Constitution, I think, given jurisdiction to the Federal Courts: But when a Consul offends against the criminal laws of the State, with which the Federal Courts have no concern, can it produce any inconvenience to permit the State Courts to exercise jurisdiction? Can the punishment of an offence against the State Laws, operate injuriously to the United States? Were Consuls like public ministers, protected by the Law of Nations, they ought not, and would not be amenable to the Laws of either Government: But as they are not privileged, because they are not the representatives of their nations, but mere private agents, no embarrassments can follow an exercise of jurisdiction over them by the States, that might not follow an exercise of similar jurisdiction over any other strangers. I am the more disposed to adopt such a construction as would save the criminal jurisdiction of the State, from the difficulty of so reconciling the different parts of the section as would lead to a practical result.

The second paragraph of the section declares, that in all cases affecting Ambassadors, public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. Original here appears to mean exclusive jurisdiction. In the case of *Marbury vs. Madison*, (1 *Cranch* 174,) this point has been fully investigated, and I think, satisfactorily decided. Should the State Courts then be deprived of jurisdiction, it follows, that Consuls are amenable to no court, but the Supreme Court of the United States. They cannot be tried in the Supreme Court of the United States for two reasons. 1st. Because the Constitution in the very section under consideration, declares, that "the trial of all crimes shall be by Jury, and the Supreme Court of the United States have no Jury: And if Congress should provide a Jury, it would then be impracticable, because,

in the very same section, it is further declared that all crimes shall be tried in the State where they have been committed.

The State Courts then must retain their jurisdiction, or Consuls are virtually amenable to no Courts. It is by no means complimentary to the wisdom of those who framed the Constitution, to give to it the construction contended for. I believe I do them more justice in supposing, that it was their intention to subject Consuls to the jurisdiction of the Supreme Court of the United States only for violations of the Constitution, the Laws of the United States and Treaties, and from the State Courts they did not mean to take jurisdiction over offences against the Laws of the State.

There is another view of this subject, which must not be omitted. In the case of *Sturgis vs. Crowningshield*, (4 Wheaton 197,) it was decided, that it was not the mere existence of the power but its exercise which is incompatible with the exercise of the same power by the States. Had the Constitution then given to the National Government exclusive jurisdiction over Consuls, in as much as they have not exercised this power, it is retained by the States.

I am aware, that a distinction may be attempted between the *Legislative* and *Judicial* powers of the Federal Government, and that my reasoning may be admitted as correct with respect to the former, and be thought inapplicable to the latter. I have only to say in the language of the profound commentator on the Constitution, "though these principles may not apply with the same force to the Judiciary as to the Legislative power, yet I am inclined to think that they are in the main just, with respect to the former as well as to the latter ; and under this impression I will lay it down as a rule that the State Courts will retain the jurisdiction they have, unless it appears to be taken away in one of the enumerated modes.

I am of opinion therefore, that the plea ought not to

have been sustained, and that the decision of the Circuit Court ought to be reversed.

Justices *Bay* and *Colcock*, concurred.

Mr. Justice *Nott* dissented.

Whether the Consul of a foreign State is amenable to the local jurisdiction of the country in which he resides for a violation of the laws of that country, is a question on which I shall give no opinion, because I consider it one belonging to the Courts of the United States, to decide, and not to this Court. But that the jurisdiction belongs exclusively to the Courts of the United States, is too clear to my mind to admit of hesitation. And whether I look to the particular phraseology of the Constitution, to the class of cases with which this is associated in that instrument, or to the general policy of the measure, I am equally lead to that conclusion.

The individual states taken unconnected by the articles of confederation, would be considered as separate, sovereign and independent states.

The Government of the United States considered in its federal capacity, is constituted of that portion of sovereignty which the individual states have surrendered or thrown into one common stock, for the benefit of the whole. That government therefore is as sovereign and independent over all matters thus surrendered as the government of each state is over those which are retained.

It would seem to result as a necessary consequence of a Government so organized, that there must be three distinct classes of judicial cases :

1st.—Those of a general nature, involving the interest of the United States in their federal or aggregate capacity.

2d.—Those of a mixed character, involving the common and mutual interests of the general and state governments, &c.

3d.—Those of a local nature, which belong exclusively to the individual states.

Over the first class, the Courts of the general Government must be permitted to exercise exclusive jurisdiction.

Over those of the second, they possess a jurisdiction concurrent with the several states.

And the jurisdiction of the third belongs exclusively to the Courts of the individual States.

Having thus seen, that these three classes of cases must necessarily exist, the nature of the cases would, in most instances, enable us to refer them to the proper jurisdiction without the aid of the Constitution. But the framers of that instrument having considered it a matter of too much importance to be left to construction, have distinctly marked out by metes and bounds the jurisdiction to which each shall belong. The 2d. section of the third article of the Constitution provides, that the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under their authority; to all cases affecting Ambassadors, public Ministers and *Consuls*; in all cases of admiralty and maritime jurisdiction; to controversies between two or more States; between a State and the citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States, and between a State and the citizens thereof and foreign States, citizens or subjects. This section embraces the two first classes above mentioned. It was unnecessary to notice the third, because all cases not delegated to the Courts of the United States, belong exclusively to those of the several States. Those belonging to the first class are all cases arising under the Constitution, the Laws of the United States and Treaties made or which shall be made under their authority; all cases affecting Ambassadors, public Ministers and Consuls, and all cases of Admiralty and Maritime jurisdiction. The second class includes all the other cases which follow in the succeeding part of the section.

I have had occasion heretofore to consider this clause

of the Constitution. But as that opinion has not been published, I cannot by reference to it show the train of reasoning to which I must now resort in support of my opinion. And I shall therefore be under the necessity of repeating what I have already said on the same subject.

The distinction between the two classes will be discovered in the language of the Constitution. The *judicial* authority of the United States is extended to *all* those of the first class. In relation to the second the word, *all*, is omitted. If the jurisdiction of the United States Courts extends to *all* of the first class, then there is none to which it does not extend, and the jurisdiction must be exclusive.

To this it is answered, that the addition of that word does not enlarge, nor the omission of it restrict the meaning of the words with which it is connected: That it may be stricken out of the first class or added to the second, and the meaning will be precisely the same. I may perhaps admit, that if it had been carried through the whole section, it would not have given the United States Court exclusive jurisdiction over all the cases therein specified; and that the omission of it altogether might not have given the State Courts concurrent jurisdiction in all. But it is the addition of it in one part, and the omission of it in another part of the same section, that constitutes the distinction.

I have assumed a position, which, I suppose, will not be denied, that there are some cases which belong exclusively to the Courts of the United States. And it must be supposed that it was intended to give the Constitution some characteristic feature by which those cases might be distinguished. And if it be by the addition or omission of a single word and the intention be apparent, we must give effect to it. When we see it studiously repeated in relation to all the first enumerated cases, and studiously omitted when speaking of the second, we cannot suppose, that such a change of phraseology was made without some object. It would be doing injustice to the venerable authors of that instrument, every word of which may be

looked upon almost as a monument of prophetic wisdom, to suppose, that it happened by accident and not by design. And if it may produce the effect which I have supposed, and can produce no other, then we have a right to conclude, and indeed I think we are bound to conclude, that, that alone was the object and no other. I apprehend, that it will be admitted, that all the other cases comprised in the same class belong exclusively to the Courts of the United States: And if so, I cannot perceive upon what principle this particular case can be denied that privilege.

If however I am mistaken in supposing, that, that point will be conceded, I must once more recur to the cases there mentioned, and I think, from an attentive perusal of them, the conclusion will appear inevitable. The first are cases arising under the Constitution; the Laws of the United States and Treaties made under their authority. When the United States in a *federal capacity* assumed the powers of sovereignty, it became necessary that they should possess all the means of carrying those powers into effect. That the operations of every government should be carried on through the instrumentality of its own agents, is an essential attribute of sovereignty. And for that purpose the powers of the legislature and judiciary must be co-ordinate and correlative. It was particularly proper therefore, that all those cases should be given exclusively to the Courts of the United States; otherwise the General Government would be indebted to the courtesy of the States, for the exercise of their most important functions. That questions of this sort may come incidentally before the State Courts and must be decided by them, I have no doubt. Such were the cases of *Potter and Bulow vs. the City Council*, and *Alexander vs. Gibson*, (1 Nott & M'Cord 527, 480,) decided in this Court. But I presume it will not be contended, that we have a direct authority over such cases.

The next description of cases embraced in its catalogue are cases affecting Ambassadors, public Ministers and Consuls. To these it is answered, that Ambassadors and

public Ministers are not amenable even to the Courts of the United States. *That* is a question on which it is not my intention to give any opinion. It is sufficient for my purpose, that those who made the Constitution supposed, that such cases might arise, and made provision for them by consigning them exclusively to those Courts. Can it be supposed, that the persons to whom was confided the important duty of forming the Constitution, did not foresee the difficult and delicate questions which would necessarily arise out of our relations with foreign nations? Ambassadors and public Ministers represent the persons of their sovereigns. Their business is with the United States, and not the individual States. And it would have been unwise and improper to have hazarded the peace of the country by subjecting their rights or persons to the jurisdiction of the State Courts over which the General Government had no control. It was equally for the peace and security of the country and foreign ministers, that all cases affecting them," should be placed in the hands where it appears to me most manifest, that they have been placed.

The last description of cases included in this list, is cases of Admiralty and Maritime jurisdiction. These cases springing out of the source from whence most of our collisions with foreign nations might be expected to arise, it was equally necessary and proper, that those also should be confined to the tribunals of the General Government. But I believe it is so universally admitted, that the State Courts have no jurisdiction over Admiralty and Maritime cases, that I will not dwell longer on the subject.

I have now gone through with all the cases over which I consider that the Courts of the General Government have exclusive authority. And when I find Consuls included in the same catalogue, and coupled in the same sentence with Ambassadors, and other foreign Ministers, I feel bound to consider them as entitled to the same privileges. I do not mean the same privileges allowed by the Laws of Nations to Ministers of a higher grade, but to the

privilege afforded them by the Constitution of being tried in the Courts of the United States. The same principle of policy which prescribed the jurisdiction of the other enumerated cases equally required that the Consuls should be included also. They are the public agents of foreign nations. They have many important public duties to perform. They constitute a link in the chain of our foreign relations, which ought not to be broken by the interference of State Authority.

We have had a recent instance of the deep interest which Governments take in the privileges of their foreign agents, in the case of the American Consul, who was lately imprisoned in *Spain*: And we cannot suppose that other nations take less interest in their safety than our own. It is a case in which the pride and honor of a nation is concerned, and respecting which it cannot feel indifferent. Indeed, I consider it a question on which the peace of the United States may so much depend, that I cannot but feel some regret that any difference of opinion should exist in this Court on the subject. This defendant, I understand, is now the Consul of France in another State. Ought he to be drawn from his public duties to save his recognizance from forfeiture? Or be detained from them to atone for his offence by any authority under the State? Suppose he should be imprisoned, and his Government should think he had been wronged? Redress would be sought for from the General Government, and not from this. If the case was in a Court of the United States, the President, from motives of policy, and for the sake of peace, might discharge the prosecution, remit the recognizance or pardon the offence. But he can have no control over it, if the jurisdiction belongs to the State Courts. As far, therefore, as policy can influence the decision, it is strongly opposed to the power which we are about to exercise.

There were but two grounds taken in the argument on which I felt any difficulty. The first was, that the immunity allowed by the Constitution to Consuls relates only

to transactions connected with their Consular functions. The second, that until Congress shall make some provision to enable the Courts of the United States to exercise their authority, the jurisdiction remains in the State Courts.

But a moments reflection dissipated all my doubts on the first point. It not only presupposes a right to enquire into the fact of his Consulship, but also of the extent of his powers and the duties of his office. That is to say, the Court may give itself jurisdiction by stripping him of his Consular character, or limiting his powers, and then try him for his offence. "*Castigatque, auditque dolos.*"

With regard to the second question, I am not satisfied that Congress has not made all the provision necessary to enable the Courts of the United States to exercise the jurisdiction vested in them by the Constitution, if any such provision was necessary. But it appears to me a question not material to the decision. If the Constitution has given the jurisdiction, exclusively to the General Government, the omission to exercise it, cannot give jurisdiction to the States. Suppose Congress had omitted to provide for the punishment of treason or piracy, would the State Courts thereby acquire jurisdiction over those offences? I apprehend not.

From any view, therefore, which I have been able to take of the question, I have seen no reason to change the opinion given in the Court below. Indeed my confidence in that opinion is increased by the support which it has derived from the very able view taken of a similar question by Chief Justice Tighlman, in the case of *Commonwealth of Pennsylvania vs. Kosloff*. (2 Am. Reg. 340. See also *Mannhardt vs. Soderstrom*, 1 Bin. 138.)

I am disposed to support the sovereignty of the States, but not to invade that of the United States, nor to violate the relations subsisting between them. I am afraid that the jarring elements of which our confederacy is composed, are bound together by but feeble bands at best; and I am not disposed to weaken them by assuming an

authority which we do not possess, or even wishing for a jurisdiction which we cannot safely exercise.

I am of opinion, therefore, that this motion ought not to prevail.

Justices *Johnson* and *Gantt* concurred.

N. B.—The Judges were equally divided in the above case; but as by Act of Assembly “the opinion of the Judge who tried the cause (Mr. Justice *Notr*) shall not be allowed, and shall have no effect in the final determination of the case,” Mr. Justice *Huger’s* opinion is the judgement of the Court.

(a.)—Burlam. Prin. Pol. Law, 424, part 4, Chap. 15. Molloy de jure Mar. et Naval. B. 1 C. 10. Martens’ Law of Nations, B. 7. C. 5, Sec. 1, 2, 3, 4. Barbut’s case, case temp. Talbot 281. Triquet et al. vs. Bath, 3 Bur. 1478. S. C. 1 Black, 471.

(b.)—1 Beawes, Lex Mercat. 291. Wickquef. Rights of Em. 40. Martens’ Law of Nations, B. 4, C. 3, Sect. 8, and notes. Brown’s Admiralty Law 505. Barbut’s case, temp Talbot, 283. Marshall vs. Critico, 9 East, 447. Clarke vs. Critico, 1 Taunton, 108. 1 Bac. Abr. tit. Ambassadors. R.



THE STATE vs. JOHN HELFRID, Senr.

The Act of 1818, increasing the jurisdiction of the Inferior City Court of Charleston, is Constitutional.

The proceeding by indictment is authorized by the Act, to prevent retailing spirituous liquors without a license, and is the proper remedy.

MR. Justice *Johnson* delivered the opinion of the Court.

The defendant was indicted, tried, and convicted in the Inferior City Court of Charleston, for retailing spirits without a license, contrary to the Act of Assembly in such case made and provided, and a motion was made in this Court to arrest the judgment.

There are several cases on the docket which depend on the questions involved in this case, and the grounds stated in the briefs, which have been furnished, are so multifarious and diversified that it would be inconvenient to intro-

duce them here, and they are deemed unnecessary as the case may be more conveniently considered and better understood by confining it to a general division of the principles involved in the various questions made.

They present the following points :

1st.—Whether the Judge of that Court (the Recorder of the City) has been appointed in such a manner as to authorize the Legislature by Act constitutionally to confer on him the judicial power, under which he claims jurisdiction of this cause and others of the same class ?

2d.—Whether the Sheriff of that Court is constitutionally appointed, and if not, whether the whole proceedings of the Court are not illegal and void ?

3d.—Whether the mode of proceeding by indictment is authorized by the Act creating this offence ?

Before entering on the question in relation to the appointment of the Judge of the Inferior City Court and the jurisdiction of that Court over the offence charged in the present case, it will be necessary to take a cursory view of its organization and the act by which this jurisdiction is conferred.

By the act of incorporation and those amendatory, the corporation were authorized to elect an Intendant and Wardens, and a Recorder, and certain other officers, and generally, “all other officers they might deem necessary and proper, &c.” and the judicial powers were vested in a Court denominated a Court of Wardens. This Court was afterwards abolished, and in its stead the Legislature in 1801, established the present Court giving to it jurisdiction of all civil causes arising within the city as far as \$ 100, concurrent with the Court of Common Pleas, and over all offences against the by-laws, and constituted it a Court of Record. This Act also provides, that it shall be “called the Inferior City Court, and be held by the Recorder of the City of Charleston, and that the City Council shall provide and fix such compensation for the Recorder as may be fit and proper and proportioned to the importance of his station, and which compensation shall not

be increased nor diminished during his continuance in office, to be paid by the city tax, and the said Recorder shall hold his commission during good behaviour." It also provides, that all cases above the jurisdiction of a magistrate, shall be tried by a Jury, and points out the mode of forming a Jury, and in fixing the fees of the officers of the Court, recognizes such an officer as a Sheriff in that Court. (3 Brev. 46, s. 68.) Under this act the Recorder is elected, and in pursuance of the City Ordinance he is commissioned by the Intendant accordingly, and in this instance as has been lately the usage, he was also commissioned by the Governor.

The Act under which that Court claims jurisdiction of the present cause, was passed in December, 1818. It provides "that the Inferior City Court of Charleston shall have concurrent jurisdiction with the Court of Sessions in all cases of misdemeanor, assault and battery arising within the City of Charleston; also in all cases of *trover, detinue, replevin and trespass*, arising within the said City, to the amount hereinafter specified; and the said Inferior City Court shall have jurisdiction in civil causes to the amount following: No verdict shall be given for a greater sum than \$ 500 exclusive of costs, but any amount not exceeding \$ 500 exclusive of costs, shall be and the same is hereby declared to be within the jurisdiction of this Court, whether the same be damages or the balance of mutual demands or single cause of action," and confines this jurisdiction to persons resident within the City, &c. The 3d. clause of the act also provides, that the Judge of this Court "shall have the same powers in the discharge of his duties as the Judges of the Court of Sessions and Common Pleas in like cases, and the proceedings in criminal and civil cases over \$ 100 shall be substantially the same as in the Courts of Sessions and Common Pleas," and an appeal is given directly from that Court to this.

Under the authority of the Acts of incorporation, no one will question, that the corporation had the power

elect both a Recorder and a Sheriff, and the question involved in the first point, is resolved into the enquiry, whether the act of 1818, conferring this increased jurisdiction over cases and offences relating to the laws of the State, is constitutional or not? As preliminary to this question, I will merely remark, that it is an axiom that does not now require the aid of reasoning to vindicate, that the Legislature of the State, as the representatives of the People, possess unlimited power, over all subjects of Legislation, not taken away by the Constitution; in as much therefore as they are not forbidden by that instrument, they had the power to pass the Act of Incorporation and to confer on them any privileges within the pale of Legislation, and among other things which no one has pretended to deny, the power to elect a Recorder and to constitute a tribunal to decide questions arising under their by-laws.

Let us then enquire whether the Legislature are forbidden to transfer a part of the jurisdiction of the Courts of the State to a tribunal thus constituted.

By the first section of the third article of the Constitution it is provided "that the judicial power shall be vested in such superior and inferior Courts of law and equity as the Legislature shall from time to time direct and establish;" and the 1st section, 6th article, provides in respect to the judiciary, "that the Judges of the superior Courts shall be elected by joint ballot of both houses," and that "all other officers shall be appointed as they hitherto have been, until otherwise directed by law." Inferior as well as superior Courts are expressly provided for, and the mode of appointing the Judges of the Superior Courts is prescribed, but that of appointing the Judges of the Inferior Courts is no where pointed out. It would therefore follow even from the axiom laid down, that the Legislature had the power of providing for it, and the last section quoted moreover expressly gives them the power under the terms "all other officers." Under this authority, they have by law authorized the corporation to

that a Judge of the Inferior City Court, or in other words conferred the jurisdiction exercised by that Court on the Recorder; as a Judge therefore entertaining jurisdiction over subjects belonging, in the language of the Constitution, to an Inferior Court, the constitutionality of his appointment cannot, I think, be questioned.

But it is said, that he is exclusively the creature of the corporation, and therefore not entitled to decide on questions over which they possessed no power. This may be true so far as he derives his power from them, but the very Act under which he is authorized to take cognizance of this cause *pro hac vice* constitutes him an officer of the State, and he may be literally said to be serving two masters, the corporation and the State, the former in respect to the power derived from it, and so as to the latter.

If this view of the subject be correct, it follows, that the Judge has been appointed and commissioned constitutionally and legally to hold an Inferior Court, and it only remains to be enquired, whether it becomes superior in consequence of the powers conferred on it by the Act under which this prosecution was entertained? The words superior and inferior as here used, do not belong to any class of the Acts which circumscribe their meaning, and must therefore be received in their ordinary acceptation, and in relation to this subject, the former may be defined to be that jurisdiction which possesses a controlling power over all others, and the inferior that which is subordinate to it.

Let the powers of the two Courts then be tested by these definitions. The Courts of Common Pleas and Sessions possess unlimited jurisdiction over all questions arising on either side: Every citizen is amenable to them, and in territorial extent it is bounded only by the limits of the State; and moreover exercises a controlling power over all subordinate jurisdictions.

The City Court by the Act creating it is denominated the Inferior Court, its limits are confined to Charleston, and its inhabitants, and its jurisdiction in criminal cases to

that class of offences denominated misdemeanors, and in civil cases to § 500. If this comparison be just its inferiority is manifest.

But it is said, that the unlimited jurisdiction conferred on it in respect to misdemeanors is superior, in as much as the Court of Sessions could not control it in relation to them. The conclusion is just, but the argument I think fallacious; for if to have concurrent jurisdiction with a Superior Court over a limited class of cases of inferior grade constitute the inferior Court its equal, the distinction is idle and useless, for all the Courts and jurisdictions in existence at the adoption of the Constitution and since organized, possess, in some measure, concurrent jurisdiction; thus from 3^l. to § 20, the jurisdiction of the Common Pleas and a single magistrate, is concurrent. The County Courts, the Judges of which were appointed by the nomination of the Legislature, had, at the adoption of the Constitution, and continued to exercise jurisdiction concurrent with the Courts of Common Pleas and Sessions to an unlimited extent over all actions arising on liquidated demands, and all crimes and misdemeanors, except criminal cases where loss of life or member might be inflicted, until they were abolished in 1798, and with all these powers no one ever entertained a doubt, that they were Inferior Courts and subordinate to the Courts of Common Pleas and Sessions; nay if we regard the *res gesta* as entitled to any influence, this jurisdiction was that expressly referred to in the Constitution under the denomination of inferior Courts.

Again, it is urged that this Court cannot control the Inferior City Court in the exercise of the jurisdiction given by this Act, in as much as the act itself declares the jurisdiction concurrent with the Courts of Common Pleas and Sessions, and vests the same powers in the Judge over them, and that therefore that Court becomes superior in respect to those powers. But I think this is no test of superiority. The only power which a Superior Court can legally exercise over any inferior or limited jurisdiction,

except by way of appeal, is to keep it within the pale of circumvalation drawn around it; and within it the jurisdiction of a single magistrate is as omnipotent as the House of Peers in England. And the true distinction between the Courts of Superior and Inferior Jurisdiction, consists in the right of the Superior to control the Inferior, in the usurpation of power which may always be safely exercised where there is a limited jurisdiction, whether that limitation is confined to subjects of litigation or persons.

It may be said that pursuing this course of reasoning to an extreme, a jurisdiction might be thus created, treading so closely on the heels of the Courts of Sessions and Common Pleas, as to render it difficult to distinguish their footsteps. But so long as there is a jurisdiction possessing a controlling power over it, the Judges of which are appointed in the manner prescribed by the Constitution, the citizen has all the security which was deemed necessary, and which is provided by the Constitution; and for myself, I am unable to discover any provision in the Constitution, which precludes the legislature from providing by law, for a Court exercising unlimited jurisdiction, and for the mode of appointing a Judge, so long as there is a jurisdiction to which it is subordinate; and I think this view is fully supported by the powers exercised by the County Courts, in many cases their jurisdiction was unlimited, and if they might in one instance incroach on the jurisdiction of the Common Pleas and Sessions, I see no point at which they might be arrested.

The objection to the illegality of the proceedings of the Court, on the ground that the Sheriff was not constitutionally appointed, is not specifically pointed out by the briefs, and the only one urged at the bar, was, that by the 6th Art. 2d Sec. of the Constitution, it is provided that "Sheriffs shall hold their offices for four years, and not be again eligible for four years, &c." and that the Sheriff of this Court, by the by-laws, is elected every year, contrary to this provision of the Constitution. I do not see how this

question can effect the case under consideration in any view. A Sheriff is not otherwise necessary to a court than to execute its orders and its process ; he certainly has no participation in the judgement of the Court, and if there had been no Sheriff, I see no reason why the Court would not be at liberty to pronounce its judgement. But giving the objection its full weight, it is equally unavailing. If the Sheriff elect was disposed to insist on it, it might become a question whether he was not entitled to hold it under this provision of the Constitution for four years ; but no one, I think, will seriously doubt that he may not safely and Constitutionally hold it for one.

The remaining question relates to the mode of proceeding. The remedy prescribed by the act creating this offence, is by " bill, plaint or information."

There is no doubt about the principle, that when an act imposes a penalty, and points out the mode of proceeding, it must be pursued, and the only question is, whether a *Bill of Indictment* is covered by the term *Bill* in the act ? *Bill*, as a generic term, would necessarily include it. But it is argued, that when used in an act, it has a precise technical meaning, and is applied to a species of private proceeding in use in the Courts in England, and the English authorities produced, would seem to justify this construction ; but that process, so far as I can learn, has never been in use in this State, and certainly is not now, and there is no other proceeding in the Court of Sessions, coming within the general term *Bill*, but an indictment, and there was no other to which it could apply, and it is a fair conclusion that the Legislature did not intend it to be understood as mere idle verbiage. But if usage may be permitted to influence the construction of a term, there never was one better settled. From the passing of the act up to this day, the Attorney-General and Solicitors have uniformly prosecuted by indictment for this offence.

It is said, however, that it has been otherwise ruled by this Court, and cases have been referred to as decisive of the question. Were I satisfied that it was so,

however reluctantly, I would readily yield my own opinion in conformity to the general principle which governs this Court, never to depart from its adjudications, except from the most imperious necessity, but the cases were decided at a time when the opinions of this Court were delivered *ore tenus*, and were forgotten as soon as the occasion which gave rise to them had passed away, or preserved only by imperfect memoranda, hastily made, and probably remodeled from memory long after. I think, therefore, that the evidences of these decisions are too equivocal to justify the Court in departing from what I conceive to be law, sanctioned by the most inveterate usage, and indeed I cannot, by the utmost stretch of liberality reconcile these supposed decisions with so uniform a practice, both anterior and subsequent.

Justices *Colcock*, *Nott*, and *Huger*, concurred.

Mr. Justice *Bay*,

I concur on all the grounds, but that upon the indictment, which is considered as settled.

Mr. Justice *Richardson*,

I dissent upon the ground, that the act gives to the City Court no cognizance of any misdemeanor, except that of assault and battery.

White and *De Saussure*, for the motion.

Hayne, Attorney-General, contra.

Note by His Honor.—A manuscript Report of the case of the State vs. Sandifer, was produced in the argument of this case, and relied on by the defendant to establish the position that an indictment would not lie for this offence. Since the argument of the case, a copy of the opinion in that case, delivered by my brother *Nott*, as the unanimous opinion of the Court, has been procured. It was brought up from *Barnwell*, and decided at Columbia in April, 1811, and was an indictment for retailing without a License, which was demurred to, and the cause assigned, was, that an indictment would not lie for the offence. The demurrer was over-ruled, and Mr. Stark, who prosecuted that case, informs me that Sandifer was afterwards convicted on that indictment, and paid the penalty.

M'DOWALL & Wife vs. JAMES WOOD & Wife.

A feme covert acting as a sole trader, may make a bond; but this power is confined to such bonds only as relate to, or are in some manner connected with her business as a sole trader.

THIS was an action of debt on a bond given by Mrs. Wood, a *Sole trader*.

The cause was tried in Charleston, Spring Term, 1819, before Mr. Justice *Colcock*, when a verdict was found for the plaintiffs.

The several grounds taken on the part of the defendants in the progress of the trial were :

1st. That the obligor being a married woman, could not bind herself by a deed of any kind.

2d. If she could, such deed should be expressly in the way of her business as a sole and separate trader and dealer.

3d. That the bond in this case was without consideration, being for the debt of another.

4th. If the deed had been lawfully executed by her, still it should have been expressly stated in the deed itself, and set forth in the original contract, that it was executed by her as a sole trader, and that not being so executed, it is void.

This was a motion for a new trial, on the ground taken in the Court below.

Mr. Justice *Nott* delivered the opinion of the Court.

The general rule of law, that not only deeds, but also all other contracts made by married women, are void, is not denied. (1 *Black. Com.* 444.)

There are, however, exceptions to that rule, as where the contract is for necessities, &c. But then the action must be brought against the husband, the contract being obligatory on him only, and not on the wife. (1 *Sid.* 120. 1 *Camp.* 120, *Waithman vs. Wakefield*. 1 *Esp. Nisi Prius*, 122, 237.) And it seems now to be settled law in England, that "a husband and wife cannot, by any agree-

ment between themselves, change their legal capacities and characters, so that a woman can be sued as a feme sole, while the relation of marriage subsists, and she and her husband are living in Great Britain." *Marshall & Rutton*, (8 Term Rep. 545.) *Wardell vs. Gooch*, (7 East, 582.) And I am disposed to think that such is the law of this state. But where the husband is in circumstances not to be sued, as where he is an alien enemy, or has abjured the realm, the wife (in the opinion of Lord Coke) is chargeable as a feme sole. (*Co Litt.* 132-6. 133 a.)

The enquiry will now be, how far a married woman, by becoming a *sole trader*, is released from the shackles which the Common Law imposes upon her by reason of her matrimonial contract; and what new disabilities she subjects herself to by such change of character?

It seems, however to be necessary, in the first place to ascertain what is to be understood by the word *trader*. And I do not know where we shall find it better defined than in the English Laws and decisions, on the subject of Bankruptcy. By the *Stat. 13 Eliz. C. 7*, Bankruptcy is confined to such persons as have used the *trade of merchandize*, or have sought their living by *buying and selling*. And under that statute, making bricks for sale, by a person not owning the soil, or buying horses for the purpose of making a *profit* by *re-selling*, and not for ones own use, has been construed *such a trading* as would subject a person to the operation of the bankrupt laws. (2 *Black. Com.* 474, 475. 1 *St.* 513. 1 *Term Rep.* 517.) But subsequent statutes were found necessary to embrace Scriveners, Bankers, Brokers and Factors, (*Do. Do.*) And Judge *Blackstone*, with these statutes before him, defines a bankrupt to be "a trader who secretes himself, or does certain other acts tending to defraud his creditors. (2 *Com.* 254.) The same author further observes, that they allow the benefit of the laws of Bankruptcy to none but *actual traders*. (2 *Com.* 473.) The character of a feme covert sole trader appears to have originated in a custom of London, and from thence in all probability, introduced

into this country. In the English books, she is sometimes called a *sole trader*. *Caudel vs. Shaw*, (4 Term Rep. 361. 3 Burr. 1776.) Sometimes a *feme-sole Merchant*, (4 Cro. Car. 68. *Lagham vs. the Wife of Bewit*.) And in 2d Black. Rep. 1197, Justice *Tates*, says, that by the custom of London, a feme covert carrying on business on her own account, is liable to her own debts, independent of her husband. It appears therefore that she is indiscriminately spoken of as a *merchant, trader* and a *feme covert, carrying on business on her account*. I apprehend, however, that when Justice *Tates* speaks of one *carrying on business on her own account*, he must mean business of merchant or trader. For I think it is now very well settled, that a *trader* means a person engaged in merchandize, or one who gets his living by buying and selling again for profit.

The words of our act are: "And whereas feme coverts in this province, do sometimes contract, &c. &c: Be it therefore enacted, that any feme covert being a *sole trader* in this province, shall be liable to any suit or action to be brought against her for any debt contracted with her as a *sole trader*, and shall also have full power and authority to sue for and recover, (naming the husband for conformity sake) any person whatsoever, all such debts as have or shall be contracted with her as a sole trader; and all proceedings to judgment and execution, by or against such feme covert, being a sole trader, shall be as if such woman was sole, and not under coverture. (P. L. 190. 2 Brev. 348.) It is reasonable to presume that this custom being derived from the custom of London, and the term *trade* or *trader* being borrowed from the English Law, was intended to be used in our act, in the same manner as it had been previously understood there. A sole trader therefore, under our act, must mean such a person as in England would be subject to their Bankrupt laws. Or if any custom or usage in this state will authorize a more latitudinary construction, it cannot be extended further than to embrace the keepers of boarding houses,

milliners, mantua makers, and persons engaged in such other trades or business as is usually carried on by women in this country.

The first question then, is, whether the bond of a feme covert, acting in that character, is obligatory upon her, or absolutely void?

It seems, that, in England, such a bond would be void. (4 D. & E. 361.) That opinion appears to be bottomed on two reasons:

1st.—Because she might thereby deprive the heir of his inheritance by subjecting her lands to the payment of her debts.

2d.—Because the custom of London extends only to simple contract debts.

The first is a reason of policy which can have no application in this state, because lands are equally subject to the payment of debts due by simple contract as by bond.

The second is founded on a custom of which we know but little, except that it exists.

But by our act, she is made liable to be sued for any debt which she may have contracted as *sole trader*, which embraces debts by bond, as well as all other debts. And this opinion appears to be supported by the reasoning in the case of *Wallace vs. Rippon*. (2 Bay 112.) Indeed she must be presumed to possess all the powers necessary for carrying on the trade in which she is engaged. To which end custom house bonds and bonds usually required of retailers of spirituous liquors, and other bonds immediately connected with her particular trade, may be indispensably necessary.

But 2d. I think this power is confined to such bonds as relate to, or are some how connected with, her business as a sole trader. It is to be observed, that the character of sole trader is not constituted by any act of the legislature; it is only recognized as existing by custom. The act confers no power or privilege except that of suing and of being sued. And it limits her authority to sue expressly to such debts “as have or shall be contracted with her as

sole trader;" and it subjects her to actions only for debts contracted by her in that capacity. It goes on further, to provide, that all the proceedings shall be carried on against her as if such woman was a feme-sole. But it no where authorizes her to perform any other act as if she was a feme-sole.

This view of the question appears to me to be further supported by the case of *Lavie* and *another*, assignees of Jane Cox, a Bankrupt, against *Phillips* and *others*, assignees of John Cox, the husband of Jane, who was also a bankrupt. In that case two questions were decided:—1st. That a commission of bankruptcy might issue against a feme-covert being a sole trader. 2d. That it must be confined to her debts in the way of her trade, (3 *Burrow* 1784.) And Mr. Justice *Aston* says "that this custom does not interfere with any marital rights; it respects only trade and commerce." It may not be clearly seen at first view, what bonds or contracts will be considered as coming within this description, and there may be a difficulty in laying down a definite rule upon the subject. But I apprehend the difficulty will not be greater than it was under the laws of England, to determine who were the subjects of bankruptcy; or in this state, to determine, what books should be received in evidence under our acts, recognizing a custom of giving in evidence the shop books of merchants, tradesmen and handicraftsmen. And although we cannot lay down, with mathematical precision, any rule by which to ascertain the character of a bond or other contract so made; yet I think it may be made sufficiently definite for all practical purposes. Indeed it may be determined by the same rule, by which we determine the character of the person. And we must leave this like every other question of construction to be settled by successive decisions of our Courts. Neither can the terms of the contract alter the law in this respect. It is not in the power of the parties to dispense with the obligations growing out of the matrimonial relations. The law on this subject, is built on the broad basis of public policy,

which cannot be defeated by any agreement of the parties. For instance, could the Court be required by any contract entered into between a husband and wife, permit them to become witnesses for and against each other, or permit a feme-covert to become bail to an action, or bound in a recognizance for her husband or any other person? The adoption of such a principle would be introducing a species of divorce not authorized by our laws.

The bond in this case, is admitted to have been given for the debt of the husband, and to relieve him from imprisonment. It was therefore founded on a consideration unconnected with her business as a sole trader, and must be considered as null and void.

This view of the subject disposes with the necessity of giving any opinion on the third and fourth grounds. I would nevertheless observe, that I think it would always be the safest course, even if it be not necessary when a feme-covert gives a bond in the character of a sole trader, to let it be expressed on the face of the bond. But I cannot conceive it to be necessary in notes, bills of exchange, and such other papers as are the usual evidences of mercantile transactions.

It may also be further observed, with regard to the main question, that the privilege allowed to feme-coverts of becoming sole traders, is contrary to the common law, and to the principles of our government; and the policy of which is at best doubtful. And our act permitting them to sue and be sued, expressly declares its object to be the prevention of fraud. We ought not therefore to extend by construction a power which it appears to be the object and policy of the law to restrain.

I am of opinion, that a new trial ought to be granted.

Justices *Bay, Colcock, Johnson, Richardson, and Huger*, concurred.

J. WALTON *et al.* vs. MICHAEL DEIGNAN.

Under the Act of 1785, the Sheriff is authorized, in serving a domestic attachment, to take possession of goods of the defendant found in the possession of a third person.

THERE were several Attachments issued against the defendant by the plaintiffs and others. These were what are usually denominated Domestic Attachments.

The Sheriff, by virtue of, and under the authority of, the said Attachments, levied on the goods of the absconding debtor, and took them out of the possession of his wife and a relation, who, it was said, lived in the house which had been the usual abode of the defendant.

A motion was made for an order to require the Sheriff to restore the goods to the custody and keeping of the wife and relation of the absent debtor. No affidavit or any other evidence of a claim to, or right in, the property, was produced.

It was contended, that where the goods were found by the Sheriff in the possession of a third person, that there his authority extended no further than serving the person so in possession, with a copy of the Attachment.

The motion was refused; and the defendant now moved to reverse the decision made below, and for such order to be granted.

Mr. Justice *Colcock* delivered the opinion of the Court.

The act of 1785 declares that "it shall be lawful for any justice of the peace, upon complaint made on oath, that his debtor is removing out of the county privately, or absconds and conceals himself so that the ordinary process of law cannot be served on him, to grant an Attachment against the estate of such debtor, or so much thereof as may be necessary to satisfy the debt and costs of such process;" "and that it shall be lawful for the Sheriff to serve and levy the same upon the slaves, goods and chattels of the party absconding wheresoever the same shall be found; or in the hands of any person or persons in-

debted to; or having any effects of, the person absconding, and to summon such person, &c." The act then goes on to say, "*Provided*, That all Attachments shall be repleviable by an appearance and putting in special bail if so ordered by the Court, or giving bond with good security to the Sheriff." And the next clause makes the Sheriff liable if defendant does not appear when ruled, and the securities adjudged insufficient: And by the seventh clause, it is declared, that if the goods and effects so attached shall not be replevied as aforesaid, then they shall be sold, &c. and the same clause goes on to declare that where the Attachment shall be returned served in the hands of a third person, upon his appearance and examination, judgment shall pass against him for such monies as he may owe the absent debtor or such effects as may be in the hands and keeping of such third person. (1 *Brev. Dig.* 40-1. *P. L.* 368.)

Upon a view of the whole context of the law, as well as a reference to the particular expressions of certain parts, there can remain no doubt but that the sheriff is authorized to take the property of the absent debtor, wherever the same may be found.

In the first place, the Act declares that the Attachment shall issue against the estate. The words embrace all the debtors property, and manifestly show the object on which the process is to operate; "to *serve* and *levy* the same." What is the meaning of the word *levy*? How does a Sheriff levy an execution? By taking possession of the goods. Even where he cannot immediately remove them, the levy vests the property in him. If it is absolutely in him, why should he not remove it? And this process is in this regard analagous to an execution. (2 *Bay*, 272. *Stephen vs. Thayer*, 5 *Mass.* 157.)

Again, the act speaks of the property being replevied. Does not this imply a possession in the Sheriff? The replevy is made either by entering special bail, or giving bond to the Sheriff; and the Sheriff is liable for the sufficiency of such security. He ought of course to be in the

possession of the goods; for where a sufficiency has not been found to pay the debtor the correct amount in which the bond should be taken cannot be ascertained without knowing the value of the goods attached.

Until the present occasion, I never heard it doubted, that the Sheriff by an Attachment could take the property of the absent debtor out of the hands of any mere occupant.

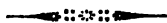
In this, as in every other case, he must take care not to take the property of another. If the person in possession, claim the goods, he may apply to the court to obtain the possession. If the evidence of right be conclusive and satisfactory, the court will order the property to be delivered, as in the case of *Schepler vs. Garriscan*, (2 Bay, 224.) Here the consignee had a lien on the goods and ship, and the captain was part owner. The Court of course did not hesitate to cause a re-delivery of the property, holding the right of the plaintiff over them as garnishees, but did not deny the right of the sheriff to take possession.

It is asked why are those in possession sometimes called upon to declare what they have in possession? The answer is obvious; they may have in their possession monies, debts and even goods, which a sheriff cannot come at. Is it reasonable to say, because there may be some which he cannot take, that therefore he shall not take that which he can come at? The Attachment operates upon all the estate; and in order to discover that estate, those who are supposed to be in the possession of any part of it, or to be indebted to the absent debtor, are called on to declare on oath what they may have, or what they may owe. Where a claim is made by the person in possession, and is opposed, the matter is referred to a Jury, under the provisions of the first Attachment Act.

What would be the result of the construction contended for by the defendant? The goods are to be left in the hands of the occupant of the house where they are found. Suppose such person should the next day follow the debtor.

or suppose he be an insolvent person, and secrete the goods, what becomes of the security given to the plaintiff? Would it not be a mockery in the law to say to a creditor, you may attach the goods of your debtor, if he absconds or goes out of the State; but you must not take them out of the hands of his friends, when these friends may be employed for the purpose of evading the law. Here there was not only no evidence offered to show a right or claim to the goods, but an affidavit was produced, to show that when the Sheriff levied on the goods, there was not even the pretence of a claim, except by the wife. The motion is dismissed.

Justices *Bay, Nott, Johnson* and *Huger*, concurred.



SUTCLIFFE & BIRD vs. JOHN M'DOWELL.

Where the drawer of an inland bill of exchange informed the payee, that he had withdrawn the funds, on which the bill was drawn, from the hands of the drawee, *Held*, that a presentment of the bill for payment was unnecessary.—(a.)

The doctrine of inland bills applies equally to checks upon banks.

THIS was an action of assumpsit upon a check for \$120, tried before the Recorder of the Inferior City Court, July Term, 1819.

The check, upon which this action was brought, was given by defendant to the plaintiffs for a horse purchased by him from them.

The report of the Judge (*William Drayton*) is as follows :

“ Mr. J. P. *White*, the plaintiff's counsel, examined as a witness, deposed, that on the morning after the delivery of the check, the defendant informed him, that he had withdrawn his funds from the bank upon which it had been drawn, alleging as a reason for doing so, that the horse, which was the consideration for it, had not answered the description under which he had been sold.”

"Mr. *Laval* called by the plaintiffs, said that about ten o'clock in the morning after the date of the check, he called with it at the bank to obtain payment for it; that Mr. *Galluchat*, the book keeper, told him, that the defendant had drawn all his money out of the bank; the witness therefore did not present it to the teller. The witness further said, that the defendant expressed a desire to buy from him a horse which he supposed the witness owned, that he told the defendant he had sold the horse, but he believed the purchaser would part with him; that upon being asked by the defendant to give the character of the horse, he replied, that he had bought the horse as being six or seven years old; that he owned him about ten months; that he had sold him to the plaintiff, *Sutcliffe*, as being between seven and eight, and he believed that to be his age; that he considered the horse as not to be equalled by one in a thousand: He drew two persons in a chair at the rate of a mile in eleven minutes; and that he was gentle, active and healthy; that the defendant afterwards complained to the witness, that the horse was old and unsound. The witness has owned a great many horses; has always paid much attention to them; considers himself well capable of judging of the age of a horse, and deems it impossible for any one, after a horse is turned of nine, to tell his age."

"In this stage of the trial, the defendant's counsel moved for a nonsuit, upon the ground, that the plaintiffs had not proved a presentment of the check for payment to the proper officer of the bank, without which he could not recur to the drawer."

"The motion was overruled upon the ground, that the act of the defendant in withdrawing his funds from the bank, dispensed with the necessity of that form, and rendered it unnecessary after the communication of that fact by the book keeper and by the defendant himself, to present the check to the teller."

"The defendant's counsel then called Mr. — Stone, who proved the signature of the plaintiff to the following

receipt, signed by the plaintiffs, but in the hand writing of the defendant :

“ Received February 8th, 1819, from John M'Dowell one hundred and twenty dollars in full for a bay horse, seven years of age, which we warrant and defend against all claims whatever.

JAMES SUTCLIFFE.”

“ The witness then said, that the morning after the date of the check, he offered as the agent of the defendant, to return the horse to *Sutcliffe*, because the character given of the horse had been incorrect ; that *Sutcliffe* said he would not take him ; that witness then told *Sutcliffe* the horse would be sold on a certain specific day, who said, he should not attend the sale ; that *Sutcliffe* acknowledged to the witness, the identity of the horse ; that in riding the horse to *Sutcliffe's*, he started very much, found him very disagreeable under the saddle ; would not ride him ten miles for his value ; considered him a very dangerous family horse ; that after the horse had been sold pursuant to notice, the witness told *Sutcliffe*, he might receive the money the sale had produced ; *Sutcliffe* said he would not : The horse sold for \$ 58, deducting incidental expenses, the net proceeds were \$ 44 29.”

“ The certificate of Mr. *Carver*, a veterinary practitioner, was then produced and admitted in evidence, stating that the horse in question was nine years old the preceding spring ; the certificate was dated on the 10th February, 1819.”

“ The plaintiff called in reply Mr. *Fawkes*, who deposed that he was present when the defendant bought the horse from the plaintiffs. *Sutcliffe* then said he had a very good character of the horse from *Laval*, from whom he bought him. Defendant said he asked no questions about the horse from *Sutcliffe*, as Mr. *Laval* had already given his character. *Sutcliffe* said *Laval* sold the horse to him as being between seven and eight ; that the defendant might take the horse upon trial for three or four days : The witness had rode the horse, found him gentle and

pleasant ; never drove him in a chaise, but has in a cart, in which he was so quiet that witness has left him with no person for three quarters of an hour at a time, and he always found him standing where he was left."

"Mr. *Laval*, again called by the plaintiffs, said, that when he owned the horse he was in good order ; when he was sold to the defendant he was rather poor ; that he has frequently left at a door his chair drawn by this horse with the reins upon the dash board, and always found him quiet ; that he has sometimes done this for three hours together ; and sometimes when the females of his family were in the chair ; that once, in consequence of a great noise occasioned by three negroes riding at full speed past the horse whilst in a chair upon a wharf, he ran off as far as the head of the wharf, but he was immediately brought back and afterwards stood perfectly quiet."

"The defence was,

1st.—That the horse did not answer the description given of him."

2d.—"That there had been a breach of warranty, as the horse when sold was near ten years old, whereas in the receipt he was warranted as being only seven."

The Judge then proceeds to state his charge.

He says, "I stated to the Jury, that the testimony respecting the character of the horse was variant and apparently contradictory ; that it was their province to decide upon it, that the weight of evidence in my mind was in favor of the plaintiffs. Mr. *Laval*, who had owned the horse nearly a year, and had used him in the chair and under the saddle ; and Mr. *Fawke's*, who had rode him, and used him in a cart, were more competent to judge than Mr. *Stone*, who had never driven him in a chair, and had only rode him once, and then only a short distance ; that the horse was represented to have been a good family horse ; a tame one, implying rather a draft than a saddle horse. That I did not think there had been a breach of warranty, in as much as before and coteremporaneously with the sale, the defendant had declared he bought the

horse upon the representation of Mr. *Laval*, and that he required no character or description from the plaintiff. And although the receipt expressed, that the horse was seven years old, yet, the defendant, who acknowledged that he bought from *Laval's* account, by whom he had been informed that the horse was between seven and eight, ought, when he wrote the receipt, to have inserted in it, if the age were mentioned at all, that the horse was between seven and eight, unless, which was probable, he considered seven, and between seven and eight, to mean the same thing; that whether the horse was as old as represented by Mr. *Carver*, or not older than as represented by Mr. *Laval*, it was difficult to determine; judgment was set in opposition to judgment upon a fact, respecting which different opinions had been given by the two persons: If the Jury believed the horse to be as old as Mr. *Carver* certified, I thought the defendant entitled to a verdict."

"The Jury found a verdict for the plaintiffs.

A notice of a motion for a new trial was served upon me, upon the grounds:

1st. That the Judge refused to direct a nonsuit conformably to the defendant's motion, notwithstanding the plaintiffs omitted to prove a presentment for payment to the proper officer of the Bank on which the check was drawn.

2d. That the verdict of the Jury was contrary to evidence, in as much as it was proved, that the plaintiffs at the time of the sale, in writing, warranted the horse to be seven years old, whereas he was distinctly proved, immediately after the sale, by a scientific veterinary surgeon, to be near ten years old.

3d. That the verdict was, in other respects, contrary to law and evidence."

Mr. Justice *Richardson* delivered the opinion of the Court.

For the reasons of the City Judge, contained in the report, it would be sufficient to say, that the motion for a new

trial is dismissed by the unanimous concurrence of the Judges in this Court. But lest erroneous conclusions should be drawn, I will notice, that there can be no question that the doctrine of Inland Bills applies equally to checks upon a bank. These are, in fact, Inland Bills. *Chitty on Bills*, (18, 200,) says, that as a general rule, where the drawer has effects in the hands of the drawee, at the time of drawing, a demand must be made, and notice of refusal to accept or pay, by the drawee, duly given to the drawer and indorsers. (7 *East*, 360. 2 *Camp*. 503.)

But it seems now well settled, that notice to the drawer is not required if there were no effects in the hands of the drawee, either at the date of the bill or from that time till it becomes due. (1 *Term* 405. 2 *Term* 713. 1 *Bos. & Pul.* 655. 1 *Bay* 291. *Swift* 290.) And this rule clearly applies to foreign and inland bills. (12 *East* 171.) Yet it should be strictly observed, that this exception to the general rule requires, that there should be a total absence of *all effects* at the date, and thence to the time of payment. A mere fluctuating balance in the hands of the drawee; or the drawers, owing to the drawee drawing a greater amount than the effects in his hands, and the like, are not sufficient. (2 *Camp*. 503. 12 *East*, 179.) I apprehend that the general rule is not dispensed with, where, by misfortune or accident, the effects of the drawer failed to reach the drawee; for the exception as introduced in *Bickerdike vs. Bollman*, (1 *Term Rep.* 410,) and since amply confirmed, (2 *Term Rep.* 713,) establishes no more than that where the drawer knew at the time that he had no effects to answer the bill, notice to him is unnecessary. And as to the indorser, there can scarcely be a case in which notice to him may be dispensed with. (1 *Bay*, 175. *Scarborough vs. Harris*. See also, note in *Wilks vs. Jacks, Peake's Cases*, 202.)

I have noticed these rules, and cited the authorities which support them, lest it might possibly appear from the particular decision in this case, that we do not acknowledge their full force. It is of great importance that

commercial nations should be uniform in the use of them, and understand each other in that regard. But in the case before us the defendant withdrew his effects in order that his own bill might be dishonoured. How then can he complain of a want of demand or notice, when he himself purposely fixed the refusal; and of course by his own act had notice of the consequent dishonour of his bill, even in anticipation of the demand and refusal of payment? It would too, be permitting a man to take advantage of his own unjust device.

As to the question made upon the facts in the case, that has been disposed of by the verdict under a just charge to the Jury, if, in the least degree erroneous, it was in admitting that there was any warranty of the age of the horse, but that was in favour of the defendant. Upon this point, the attempt has been to make the plaintiffs liable for a supposed error in the age and description of the horse given by Laval; and that description too, if not the age, judging from the evidence adduced, is probably correct.

The motion is refused.

Justices Bay, Colcock, Huger, Nott and Johnson, concurred.

(a.)—STEPHEN LILLEY vs. JAMES A. MILLER.

Where the drawee of a bill of exchange has been forbidden by the drawer to pay it when it should be presented, of which the drawee informs the payee before it becomes payable, it is not necessary, that the payee shall present it for payment to the drawee, when it becomes due, and give the drawer notice of nonpayment.

SUMMARY Process, tried before the Recorder (*William Drayton, Esq.*) of the Inferior City Court, July Term, 1819.

The Judge reports as follows:

"This suit was brought to recover twenty dollars, the amount of two orders drawn by the defendant upon Mr. Roach, the City Treasurer, in favour of the plaintiff. The plaintiff proved by Mr. Roach, that the defendant was a city-officer receiving a salary from the corporation; that the orders drawn by the defendant had been presented to the witness shortly before they were payable; that he refused to accept them, at the same time informing the plaintiff, that they would not be paid, as the drawer had expressly forbidden him to pay them at whatever time

they should be presented. The defendant's counsel contended, that the plaintiff could not recover, because he had been guilty of *laches* in not presenting the orders for payment when they became due, and because he had given no notice of their nonpayment to the drawer. The plaintiff's counsel left the case to the Court without argument. The Judge then notices his charge as follows: He says, "I stated to the Jury, that, according to the general rule, the drawer was entitled to notice of nonacceptance and nonpayment; but where he has no effects in the hands of the drawee, between the time, when the order is drawn and its becoming due, he is not entitled to such notice. (*Chitty on Bills* 151.) That a drawer's giving express orders to the drawee not to pay, furnished a stronger reason for dispensing with notice; because although the drawee had no effects, he might nevertheless pay for the honor of the drawer; but in the present case, all chance of payment was out of the question; that drawing a bill upon another and directing him not to pay it, amounted to a fraud and disentitled the drawer to the protection of those rules which were only intended for the benefit of those acting *bona fide*, (*Clegg vs. Cotton*, 3 Bos. & Pul. 241, 242, and 243,) I was therefore of opinion, that the plaintiff was entitled to a verdict."

"The Jury found for the plaintiff, and a notice of a motion for a new trial was served upon me upon the following grounds:"

"1st.—Because the plaintiff did not prove, that the said orders were presented to the drawee for payment, when they respectively became payable; although he proved by the drawee, that the defendant forbade him (the drawee) from accepting the orders, yet that was not sufficient in law to exonerate the plaintiff from the obligation of presenting the orders for payment."

"2d.—That the plaintiff was guilty of *laches*, in as much as he proved no notice to the defendant of nonpayment of the said orders by the drawee, which notice he was legally bound to have given, as it appeared in evidence by the plaintiff's own testimony, that when the orders became due, the defendant had effects in the drawee's hands which were soon after drawn out by the defendant."

"3d.—That the verdict was in other respects, against law & evidence."

The opinion of the Court was delivered by Mr. Justice *Richardson*.

I cannot add to the reasons given by the Recorder; and we need not, to the law and adjudications he has cited.

Can a man, who has forbidden the payment of his own bill, complain of a want of notice of its dishonor with more reason than the drawer, who for the same purpose withdraws his funds in order that payment may be refused, which this Court decided but a few days since in the case of *Sutcliffe & Bird vs. M'Dowell*? The moment the defendant forbade the payment, he took notice of the true situation of his money in the hands of his cashier, which is the object of notice; and any application for payment afterwards would have been idle and unmeaning.

If the drawer still intended his bill to be paid, after his prohibition, he should have notified the drawee and holder of his reconsideration; but until doing so, he cannot take advantage of a seeming *laches* which he caused himself, and which could do him no injury.

The motion is refused.

Justices *Colcock, Nott, Johnson, Huger, and Bay*, concurred.

ISAAC C. MOSES, *vs.* RICHARD & MARY JONES, Executor and Executrix of WILLIAM JONES.

The Executor of A. was sued on a note of hand; plea statute of limitations; replication, that by the Act of 1789, nine months are allowed to Executors and Administrators after the death of their testator or intestate, before they can be sued, and that the plaintiff ought not to be barred, having been restrained by the aforesaid Act nine months, from commencing his action. *Held*, that the plaintiff was allowed four years exclusive of the nine months.

The Act of 1789, suspends the operation of the statute of limitations, nine months after the death of the testator or intestate, but does not take from the plaintiff any part of the four years allowed by the act of limitations.

TRIED before Mr Justice *Johnson*, at Colleton, April Term, 1819.

This was an action on a note of hand given by *William Jones*, deceased, to the plaintiff, for \$229 68, payable on the 1st January, 1809.

Jones died on the first of October, 1811, and this suit was commenced on the 30th March, 1813.

The Statute of Limitations was pleaded, to which it was replied, that by the act of 1789, commonly called the Executor's Law, nine months are allowed to executors and administrators after the death of their testator or intestate, before they can be sued; and that therefore the plaintiff ought not to be barred, he having been restrained by the aforesaid act, for nine months after the death of the testator *Jones* from commencing his action.

The Presiding Judge being of opinion that the plaintiff was barred, a nonsuit was submitted to, and a motion was *now* made, to set aside the nonsuit, on the ground that the

plaintiff being prohibited by the act of 1789, from commencing his action, until nine months after the testator's death, should be allowed four years exclusive of the nine months.

Mr. Justice *Colcock* delivered the opinion of the Court.

By the 12th section of the limitation act, parties are allowed four years to commence suits after the right of action has accrued ; this act was passed in 1712.

By a subsequent act, passed in 1789, (commonly called the Executor's Law,) it is enacted, " that no action shall be commenced against any executor or administrator for the recovery of the debts due by the testator or intestate, until nine months after such testator or intestate's death."

Where the debtor dies after the action has accrued, and before the four years expire, by the operation of this latter act, 1789, nine months will be taken from the four years allowed the plaintiff to sue ; and if but nine months of the four years remained unexpired at the death of the testator or intestate, the suit would be barred in three years and three months, as this latter act was intended for the benefit of estates. To allow the executors and administrators time to look into the affairs of the estate, and to collect debts which may be due, so as to prevent unnecessary sacrifice of property, it would be highly unjust to suffer it to operate to the prejudice of honest and indulgent creditors. It has therefore been decided, that the act of 1789, suspends the operation of the limitation act for the period of nine months after the death of the testator, or intestate, but does not take from the plaintiff any part of the four years allowed by the limitation act. The case alluded to, was *William Wightman*, against the executors of *Joseph Chouler*, decided, at the January sitting, 1808. The brief in that cause, states, " that the action was brought on a promissory note, given by the defendant's testator. The defendants pleaded, that their testator had not assumed within four years. The plaintiff replied in bar to the plea, that by the act of 1789, it was rendered il-

legal to institute a suit against executors or administrators for the debt of their testator or intestate, until nine months after the death of either, and that the time which had elapsed after making the promise and assumption (and previous to the death of the testator) did not, together with that which elapsed after the expiration of the nine months, and after death of the testator, and previous to the issuing forth of the writ, make up the time or period of four years. To this replication, the defendant demurred, and the plaintiff joined issue. On argument, the demurrer was overruled by the whole bench" This authority being directly in point, is considered as deciding the case.

The motion is granted.

Justices *Nott* and *Johnson* concurred.



THE STATE vs. JOHN FISHER.

Unless a verdict is clearly and manifestly against evidence or wholly without evidence, the Court will not set it aside.

That which was a cause of Challenge to a Juror, shall not be made the ground of a new trial.

TRIED before Mr. Justice *Colcock*, at Charleston, May Term, 1819.

The defendant was indicted for high-way robbery, and on the trial it appeared that one John Peoples was travelling from the city to the upper country with his waggon, accompanied by a youth of about sixteen years of age, by the name of Zachariah Carwell; that upon their arrival at the six mile house, they stopped to water their horses at a well near the house; while in the act of doing so, a negro came out of the yard of the house, and demanded the bucket which they were using, (which was their own) for the purpose, as he alledged, of watering his horse. The prosecutor refused to give it to him, and some words ensued, upon which a number of persons came out of the house, at least ten, as the witness supposed, armed with

guns, pistols and sticks. The prosecutor seeing them approaching in this hostile array, took an old gun out of his waggon, upon which the lad called to him that she was not primed. The party instantly rushed in upon him, knocked him down and beat him most severely; among these, was the prisoner *Fisher* and one *Howard*. After they left the prosecutor, he got into his waggon, and the boy drove slowly on, when they had passed about 200 yards from the house, they were overtaken by the prisoner and Howard. All were armed. They asked for the prosecutor, and when they learned that he was in the waggon, they ordered him to come out, threatening to take his life. He came from under the cover of the waggon, and seated himself on the side of it; *Howard* had rode to the head of the foremost horses, and stopped them; the prisoner had dismounted, and Howard snapped his pistol at the prosecutor, and as the boy thought, once flashed it; *Fisher* pulled the prosecutor down, and carried him about 20 steps behind the waggon; Howard put his hand in his pocket, and took out his pocket-book, the prisoner holding the prosecutor by the arm. In opening the pocket-book, some small silver dropped out, and Howard threw out some papers. The prosecutor begged for his papers, and he was ordered to pick up the silver, which he did, and handed it to *Howard*. The prisoner searched his pockets, but the prosecutor assuring them that he had no more money, they rode off and left him, and returned into the yard of this house. The prosecutor had about \$40 or \$50, which he had received for freight; the whole of which was taken. On the next day, the prosecutor came to town, and on the Sunday after, he went to the gaol to see these persons, when he pointed out *Fisher* and *Howard*, as the men that robbed him, and he recognized some of the others who were of the party that beat him, but he was mistaken as to one of them. No names were mentioned until he identified them. On the trial, the prisoners were ordered to stand up, and he again swore positively to *Fisher*, but was mistaken in supposing that he had seen *Sterret* in gaol. All

the important facts were corroborated by the testimony of Carwell.

On the part of the prisoner, *Andrew Hard*, *Martin Bergin* and *Zilphea Miller* were sworn, who testified that they were at the house when the affray took place; that they remained there until the prisoner and *Howard* set off for town, which was about half an hour after, and they accompanied them to town, and never, during the time, lost sight of them for five minutes. They also contradicted the testimony of the prosecutor, as to some part of the prisoner's dress.

Upon this evidence the Jury found the prisoner guilty, and a new trial was moved for, on the following grounds, as stated in the brief offered by the prisoner's counsel:

1st.—That the evidence did not warrant the verdict in as much as the robbery stated to have been committed was alleged by all the witnesses to have sprung out of a quarrel and fight that took place at a well in that neighborhood, relative to watering horses, and it was clearly proved by the three witnesses on the part of the prisoner, who were present at the time, that he never left the six-mile house or followed the prosecutor up the road to the place where the robbery was stated to have been committed, thereby clearly establishing an *alibi*.

2d.—That the prisoner's person was not identified, there having been essential variations in the description of his size and countenance, and the dress he wore on the day of the alleged robbery, between the witness who testified on the part of the state and those who testified on the part of the prisoner.

3d.—Because one or more of the jurors who were empaneled and sworn, and who tried the cause, did not pay nor do pay taxes according to the act of assembly, and were therefore not legally qualified to sit as jurors in this case.

Mr. Justice *Colcock* delivered the opinion of the Court. The two first grounds relate altogether to the insuffi-

ciency of the evidence, and it is only necessary as to them to repeat what has so often been said on this subject; unless a verdict is clearly and manifestly against evidence or wholly without evidence the Court will not set it aside. It is the peculiar and exclusive privilege of the jury to decide on the weight of evidence, and also on the degree of credit to which the witnesses shall be entitled. The testimony on the part of the state was positive, and the prosecutor's not being able to identify one of the persons whom he saw in the gaol, and mistaking one of those at the bar for one whom he had seen in the gaol, were circumstances too trifling and unimportant to impugn his testimony, particularly as it was corroborated by another witness who swore to all the material facts; both of the witnesses swore positively to the identity of the prisoner; both recognized him at the first sight. As to the witnesses on the part of the accused, the account which they gave of themselves; the manner in which they gave their evidence; and above all, their being considered as the associates of the prisoner, were circumstances which no doubt, tended to discredit them in the estimation of the jury.

The last ground is one of some importance, and, if it had not been repeatedly decided in our courts, would have merited some observation. In the case of the *State vs. Joseph Quarrel*, (2 Bay 151,) it was decided by the unanimous opinion of the bench, that, that which was a cause of challenge to a juror, shall not be made the ground of a new trial; That the prisoner had a right to the panel, and a copy of the indictment three days previous to his trial; the end and design of which was to enable him to ascertain the character and qualification of the jurors who were to sit on his trial, and if he would not do so, he should not be permitted to take advantage of his own negligence. I cannot forbear to add, that if this were not the law, that I am satisfied from my experience, that justice would be laid prostrate at the feet of offenders.

The motion is discharged.

Justices Bay, Nott, Johnson, and Huger, concurred.

FRANCIS RIVERS vs. JOHN GRUGET.

In an action of assumpsit on an implied warranty of a horse, a slight or temporary defect will not warrant the rescision of the contract or the recovery of the price paid.—(A.)

THE plaintiff purchased a grey horse of the defendant at \$250, but being dissatisfied with his gaits, he proposed to the defendant a few days after to exchange him for another, and the defendant told him, that he would let him have choice of three others which he had, in exchange, and the defendant took, in exchange, a bay horse the subject of this action.

One witness, who rode home with the plaintiff, stated, that the horse was apparently well, active, and strong, but the next day, it was discovered, that he was diseased with a swelling of the *vagina penis*, was lame and disposed to drag one of his hind feet.

The plaintiff then tendered the horse to the defendant, and upon his refusal to take him, gave him notice that he would be sold at auction on his account, and he was sold accordingly, and the defendant through an agent purchased him at that sale, for \$75, and this was an action to recover the difference between the proceeds of this sale and this given.

Several witnesses on the part of the defendant, who had known the horse both before and after the sale, stated that they believed him sound at the time the plaintiff got him, and that he was so at the time and after the sale at auction; and those accustomed to horses and skilled in their diseases, stated that the swelling of the *vagina penis* was common to them, not dangerous and easily cured; and that the lameness and disposition to drag the hind feet were the probable consequences of it.

One of the witnesses who knew the horse said, that, at the time of the sale at auction, he thought the horse was worth, and ought to have brought, \$175.

The case was left to the jury and they found a verdict

for the plaintiff, for the difference between the sum paid for the grey horse and the proceeds of the sale of the bay, at auction :

A motion was made for a new trial on the ground, that the verdict was contrary to evidence.

Mr. Justice *Johnson* delivered the opinion of the Court.

There was no proof of an express warranty on the part of the defendant, as to the soundness of the horse ; and the claim of the plaintiff to a recovery, arises out of the doctrine of implied warranty, established as law in this state, which is extended to all defects of the thing sold, whether known or unknown to the seller. But I apprehend that every slight or temporary defect will not warrant the rescision of the contract, or the recovery of the price paid ; it ought to be of that character which renders the thing sold *permanently* less valuable, either as to duration or extent ; any other rule would tend to the utter destruction of all contracts, as there is scarcely any article of traffic which will not exhibit some mark or blemish which might escape the notice of a close observer.

The facts in this case prove that the defect complained of, was, in its nature *temporary*, and easily cured, and that in fact the horse was well in a few days, and there is no proof that any actual injury was sustained, unless it be that which arose out of the plaintiff's own folly in selling the horse.

In all cases depending on facts it is with the utmost caution I would interfere with the finding of a Jury, but I think it is manifest that in this case, they have been governed more by the supposed equity of the case, arising out of the defendant's having purchased the horse at so low a price, than the strict rule of right ; and I think they were also mistaken in adopting the value of the gray horse as the standard of their damages. The true standard was certainly the value of the bay horse, which is proved to be less than the sum given for the gray.

Indeed the whole circumstances taken together, were as well calculated to mislead a Jury, intending to do justice to the parties, as any that could well exist. The defendant had got his own property again, and still retained a considerable sum, which he received from the plaintiff; which upon the first view would seem to give the plaintiff a fair claim upon him, but when his right is tested by the rules of law, the unreasonableness of the claim is manifested. If the plaintiff gave in the first instance more than the horse was worth, or if he inconsiderately suffered him to be sacrificed by a sale at auction, it was his own folly, and I see no reason why the defendant was not as much at liberty to take the benefit of it as any other person; and it does not belong to a Court or Jury either to make contracts for the parties, or set aside those that are fairly made.

The motion in this case ought therefore to be granted.

Justices *Colcock*, *Richardson*, *Nott* and *Huger*, concurred.

Bennett & Hunt, for the motion.

De Saussure, contra.

(a.)—In the case of *Garment vs. Barrs*, Chief J. Eyre, observed, “a horse labouring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not for that an unsound horse; and where a warranty is made, that such a horse is sound, that it is without any view to such an injury; nor is a horse, so circumstanced, an unsound horse within the meaning of the warranty.” 2 Esp. N. P. R. 673. R.

PETER TORRE vs. — SUMMERS.

In an action for Crim. Con. the misconduct of the wife, before her seduction by the defendant, may be given in evidence.

A witness is admissible to prove that he had Criminal Conversation with the wife previous to her seduction by the defendant, where the witness himself does not object to give such testimony.

A new trial will not be granted on the ground of excessive damages in an action for Crim. Con.

TRIED before Mr. Justice *Bay*, at Charleston, October Term, 1819.

This was an action to recover damages for Criminal Conversation, by the defendant, with the plaintiff's wife.

It is sufficient to state, that testimony was given to support the important allegations of the plaintiff, both as to his own intermarriage with the supposed wife, and her criminal Conversation with the defendant. This connection was at least as early as August, 1815. In July of the same year, she had left her husband, but with whom, did not appear. Before her elopement, the defendant had been seen to lift her up, and to *kiss* her. He had been also heard to say, that when rich enough, he and she would live together: And accordingly, in August, they were actually living together.

In this state of the facts the defendant offered witnesses to prove, that subsequent to leaving her husband, but prior to the time when she was found actually living with the defendant, in evident adultery, she had had criminal conversation with other men.

This testimony was overruled by the Presiding Judge.

The defendant's counsel also proposed to ask one of his witnesses, whether he, the witness, had not had criminal conversation with the plaintiff's wife. The exact time to which this enquiry would have referred, does not appear. But the Judge, upon the motion of the plaintiff's counsel, overruled the question.

The case afterwards was laid before the Jury, who found a verdict for the plaintiff in \$ 5,000.

A motion was made for a new trial upon the following grounds :

1st.—Because the testimony offered, of the wife's misconduct subsequent to leaving her husband, but prior to any certain connection with the defendant, should have been received.

2d.—Because it was competent for the defendant to enquire, if the witness had not himself had criminal conversation with the plaintiff's wife.

3d.—Because the damages are excessive.

Mr. Justice *Richardson* delivered the opinion of the Court.

This is but the second instance in which such a case as the present, has been laid before the constitutional court. Upon its general character and tendency, and the feelings it is calculated to excite, there can be but one opinion and one wish, i. e. the anticipation that the case can seldom arise, and the hope that it will not be brought without both merits and a prudential consideration of the exposure incident to such actions.

Though it is not absolutely necessary to discuss the ground of excessive damages; yet, I will notice the rule which should govern. And in so novel a case, I will not refrain from the reflections arising from the subject, before examining the points of strict law.

I know of no instances in which courts have granted new trials on account of excessive damages given in suits brought for criminal conversation. (*See Duberly vs. Gunning*, 4 Term 659.) And that practice has great intrinsic reason. Examples of chastity have the happiest effects; because man is at least emulous of virtue; while instances of incontinence produce the worst, because the passion that leads to it is universal. And however true it is, that there is no enjoyment so great as that which is innocent and restricted, yet, under the incentive of example, this passion scarcely acknowledges any bounds.

The practice of Judges in disallowing new trials upon the ground of the mere excess of damages, wherein the appeal is entirely addressed to discretion, is doubtless founded much too upon the consideration, that the order and happiness of society depend greatly upon continence in both sexes. Strictly speaking too, by the seduction of a wife, the positive loss to her husband is very great. Under the rules of law, he cannot, while the first is alive, take a second wife; his loss is therefore greater than if she were destroyed altogether. The wound inflicted on his peace of mind, is deep and lasting. "The spirit of a man may sustain his infirmity, (his bodily ills and misfortunes)

but a wounded spirit, who can bear?" And though the "*wounded spirit*" means conscious guilt, yet dishonour is nearly allied to it. The great writer, who for his keen inspection, "deep through the human heart," deserves the distinguished encomium of "*natures boast*," is most just, when he says, "he, who filches from me my good name, &c. makes me poor indeed." For, with good name, man has lost the great mean of success and usefulness in life. The former the object of the selfish, the latter the noble aim of the generous. But how much poorer does he make me, who with the disrepute, which provokes unfeeling scorn, instills that inward sense of dishonour, which, like the "*wounded spirit*," none can bear. Would the seducer ask himself what damages would requite him, were he the injured husband, he would probably conclude, that as the brutal ravisher of a woman, should be prepared to meet death, so the deliberate seducer of his neighbours wife cannot look for less than pecuniary ruin, and he would then too, admit that society should be as ready to recompense the injured husband, and to punish his wrongdoer as the immediate sufferer himself. Would he, when practising arts of seduction, but ask himself what would be his feelings, were *his* wife or *his* daughter defiled? Even the gallant, gay "*Lothario*, warm with the Tuscan grape, and high in blood," might pause, reflect, and say to himself, I will not for this end, and to her ruin, seek the weak *Calista*, to break the peace even of *Horatio*, though I love him not. I will not be the villain *spider of society*, to watch where weakness strays, and to weave meshes on the way, that innocence may be entrapped. I will not be the reptile, that *unpitying*, sees the agony which follows from his poison or his snares. But the character of the charge against the defendant, the practice of other Courts, and the evils which might result from a different course, *all* concur, and would alike forbid our granting a new trial upon the ground of excessive damages.

Yet the motion must prevail, upon both the other grounds.

The rule is well established, that though the wife's aberration, after her seduction by the defendant, or after her elopement with him, cannot be given in evidence; yet, it is also clear, that her conduct until actual seduction, by the defendant, may be proven. (*Peake* 331 *Phil.* 139.) Now in this case there was an interval of time, which, though very suspicious, was equivocal, i. e. from the day of leaving her husband in July, to her certain cohabitation with the defendant, in August following. 'Tis true, she had eloped, but with whom, does not appear with certainty. The defendant had exposed his designs, and had kissed her: And though I do suspect, that it did not, in this instance, require the deceitful kiss to consummate their treachery, but that the husband had been before betrayed. Still further enquiry was necessary, and the defendant had a right to the evidence of her misconduct with others, while that with himself was suspected only. (*Boynton vs. Kellog*, 3 *Mass.* 189. *Phil.* 64. *Peake* 331.) And if finally it should have turned out, that his own criminal intercourse with her, had in fact preceded such misconduct with other men, the evidence could, and would have weighed nothing.

The second ground is equally clear. The object was to prove the wife's meretricious conduct before seduction by the defendant. And provided the witness did not himself object to divulging his own immorality, it was not competent for any other person to do so. It would evidently be the best possible testimony, however degrading to him who would voluntarily publish the fact. For he who answers against his own interest, is, on that account, the more credible. (*Peake* 160.) And however indecent too the exposure might be, yet the laws make no distinction of that nature. (*Swift* 77, 80, 81.) And though we may not protect a seducer of women with all the feelings of men whose dearest rights are at stake, yet the meanest claim the equal distribution of rights. Here no partial spirit like assuming primogeniture interferes to place one brother above another; but the eldest and the youngest,

the greatest and the weakest child of the republic, take in equal partition the common heritage of the laws.

Justices *Colcock, Nott, Johnson, and Huger*, concurred.



WILLIAM JOHNSON *et al.* vs. BRAILSFORD.

The degree of "burning, cancelling, tearing, or obliterating," necessary to the revocation of a will, according to the statute of frauds, must depend on the circumstances of the case.

Where a will has been interlined, and crossed in places, and the seals torn, and the jury find that it was done *animo revocandi*, this is a sufficient revocation.

The slightest "burning, or tearing," &c. of a will, accompanied with satisfactory evidence drawn *abunde* of the intention of the testator to revoke, will satisfy the statute and act as a revocation.

Our act of assembly uses the word "destroying" instead of the words "burning, cancelling, and tearing," in the statute of frauds, but the construction is the same.

Where a person has torn off the seals of a will, interlined it, &c. *animo revocandi*, and it appears he afterwards intended to make another will which he never executed, this will not re-establish the will.

THIS was an appeal from the Ordinary of Charleston district, to the Circuit Court, where, on a feigned issue being submitted to the Jury, the following special verdict was found, viz. "1st. We find that the late *William Johnson*, duly made and executed his last will and testament, in the words following:"

"*South-Carolina.*"

"In the name of God, Amen. I, *William Johnson*, of Charleston, Blacksmith, being, by the blessing of God, in health of body and of sound and disposing mind and memory, do make this my last will and testament, in manner following, that is to say: To my beloved wife, *Sarah Johnson*, I give and bequeath, for and during her natural life, my plantation at Goose-Creek, together with the plantation stock of every kind, also the house in which I now reside, together with all the plate and furniture therein, house servants, coach and coach horses, and also my

two houses or tenements, at the corner of Queen-Street, and Kinloch's Court, house and lot in Chalmers' Ally, tract of marsh land on East Bay, opposite to Hazel-Street, whereon my Blacksmith's Shop now stands, and my bank and canal shares; to have and to hold for her own use, comfort and maintenance and education of my minor children, who are to have as good an education as can be given them, suited to their capacities and the profession they seem inclined to pursue. And whereas, for the establishment of several of my children, I have given and advanced property in my estimation, to the several amounts following, that is to say, to my son Thomas, deceased, fourteen hundred and fifty pounds, sterling; William, one thousand; Joseph, twelve hundred pounds; John, sixteen hundred and fifty pounds; Benjamin, three thousand pounds, besides a tract of land; and to my daughter Jane, twelve hundred pounds on her marriage, I now give, bequeath, and devise, to my daughter Sarah, my house and lot at the corner of King-street and Black-Bird ally, which I estimate at two thousand one hundred pounds; to my son Isaac, my house and lot, at the corner of King and Federal-streets, and a house and lot in Anson-street, all which I estimate at two thousand one hundred pounds; and to my son James, the house and lot of land adjoining the one in which I now reside, and from and immediately after his mother's decease, the house and lot in which I now reside, both of which I estimate at two thousand one hundred pounds. To my fatherless grand-children, Thomas Johnson, and Eliza, Sarah, Jane, and Edward, M'Crad- dy, I give one hundred pounds to be paid them as they respectively attain the age of 21 years, or day of marriage; furthermore, in order to equalize my estate in proportion among my children, sons and daughters, as nearly as human judgment will admit, I give and bequeath to my son William, one thousand pounds, Joseph, — hundred pounds, John, — hundred pounds, Benjamin, a suit of mourning, to my daughter Jane M'Crad- dy, one thousand pounds. It is my will and pleasure, and I do hereby

authorize and direct my executors hereinafter named, as soon after my death as conveniently may be, or the majority or survivor of them, to make sale of all my Edisto lands, that is, one tract on Yarrow branch of Edisto river, one in the fork thereof, one tract on Ireland creek, and my tract on Burn's creek near the Catawba nation, a new acquisition from the state of North-Carolina; also my negro blacksmiths, and such other town negroes as are supernumeraries, and so apply the proceeds to the payment of my debts and legacies; my pew in St. Philip's church, I give to the use of my wife and family during her life, and after her death, to my son William if he should be a resident of Charleston, otherwise I give the same to my son James. I further will and direct that on the decease of my said wife, her life estate or all and singular the estate herein allotted to her maintenance and the maintenance and education of my minor children, together with the rest and residue of my estate both real and personal, should be so divided, apportioned, or disposed of as to raise such of my children's portions as are under three thousand pounds to that amount; and should there be an overplus of estate, then the same to be equally apportioned among them. And in case any of my said children should die under the age of twenty-one years or die leaving no lawful issue and unmarried, then the portion of the deceased to be equally divided among my surviving children. And I do hereby appoint and constitute my wife, Sarah Johnson, Executrix, and my sons, William, Joseph, and John, Executors, of this my last will and testament.

“WILLIAM JOHNSON.

“Signed, published, and declared, in the presence of us, who, in the presence of the testator, have subscribed as witnesses.

“N. B.—The rasure of the word ‘twelve’ and the interlining of the words ‘two thousand one’ was done before the execution hereof, and was executed this 25th day of October, in the year of our Lord, 1808. Florian C. Mey, Charles S. Mey, John H. Mey.” “To which said will

was subjoined and duly executed, a codicil in the words following:—

“In the name of God. Amen. I, *William Johnson*, within named, being of sound and disposing mind and memory, do make and ordain this codicil to my will: In the first place, having set up my son, *Isaac*, in business, with my son, *Joseph*, and advanced him about the sum of twelve hundred pounds, I do hereby declare the same to be in lieu and extinction of the specific devise made to him, in my said will; secondly, I do hereby give and bequeath to my foster-child, *Ann Catharine Van Norden*, the sum of one hundred pounds, to be paid her within one year after my decease. Thirdly, I do hereby authorize and empower my executors and executrix, within named, or the majority of such as shall qualify, to sell and dispose of such of my property as can be sold with the least inconvenience to my wife, for the purpose of raising such sums of money as may be required to satisfy my several bequests according to the true intent and meaning of my said will.”

“WILLIAM JOHNSON.

“Signed, sealed, and declared, in presence of us, who, in the presence of each other, have hereunto set our hands, *James George*, *Isaac Teasdale*, *Richard L. Latham*.”

“Which said codicil bears no date, but from the reference to the setting up of *Isaac*, one of the testator’s sons, we find it was executed after the twelfth day of December, eighteen hundred and twelve. We further find, that the said will and codicil were found in the private desk of the deceased, and at the time of its being found, the seals with which the said will and codicil had been executed, were torn off after having been previously crossed with a pencil, and below the name of the testator, and in the hand writing of the testator, written with a pencil, were the following words and figures: ‘I think my will at this time unequal; with God’s permission, I mean to alter it, and have all sold, but the house and servants, &c. to Mrs. Johnson,’ and also sundry interlineations in pencil on the face

of the said will as follows: between the 25th and 26th lines, the figures, '16,' are placed over the word 'fourteen;' between the 27th and 28th lines, '16 hundred' are placed over the words 'fourteen hundred;' between the 28th and 29th lines, the words 'besides a tract of land' are interlined over the words, 'three thousand pounds;' on the second page, between the 5th and 6th lines, the word, 'fatherless,' is interlined over the words, 'my grand-children,' and in the same line, the words, 'Sarah and,' are struck out. In the 16th line, the words, 'a suit of mourning,' are struck out; between the 21st and 22d lines, 'all,' interlined over the words, 'my Edisto lands;' between the 23d and 24th lines, the word 'Burns,' interlined over the word 'Burrs.' 2d. We further find, that, about the time the said memorandum bears date, the testator directed another will to be drawn out for him differing materially from the above recited will; which was accordingly drawn out, but never executed; and also, from the declared intention of the testator, to alter his said will, and from its being found in his private desk, we are of opinion, that the seals were torn off as aforesaid by the testator, and with an intention to revoke the said will; but whether the said will be legally revoked, the jury are uninformed and pray the instruction of the court. If the court are of opinion, that the facts aforesaid amount to a legal revocation of the said will; and that the evidence thereof is sufficient legal evidence to find such revocation on, then they find for the plaintiff, and that the said William Johnson died intestate. If otherwise, then they find, that the said William Johnson did make, and execute, and leave in force the said will as copied into this verdict, and they find for the defendants."

Mr. Justice *Huger* delivered the opinion of the Court.

1st.—In support of the will, it is contended that there can be no revocation of a will executed, according to the statute of frauds, by the tearing and obliterating the seal—And

2d. That supposing the destruction of the seal to a will

may, in the abstract amount to a revocation of it, yet, that the revocation in this case, was not an absolute self subsisting revocation, but depended upon the substitution of another will, which having failed, the revocation is incomplete, and the will therefore must be valid. I shall consider these grounds in their order.

The Statute of Frauds which has been made of force in this state, declares that all "devises and bequests, duly made and executed, shall continue in force until the same be burnt, cancelled, torn or obliterated by the testator or by his directions, &c. &c."

The degree of burning, cancelling, tearing or obliterating, necessary to the revocation of a will, is not fixed by the statute. This must depend upon the circumstances of the case.

If a will be thrown into the fire, and is consumed, or if it be torn into many pieces by the testator, the violent presumption would be, that the instrument was burnt or torn *animo revocandi*, and it would require strong evidence to rebut this presumption; but if a will be only slightly burnt or slightly torn, there would arise no presumption from the act itself of the intention, or the *quo animo*, with which it had been done, and the will would not be revoked; but if the slightest burning, or the slightest tearing be accompanied with satisfactory evidence, drawn *aliunde* of the intention to revoke, the statute will be satisfied, and the instrument be revoked. *Burtenshaw vs. Gilbert*, (1 Cowp. 59. 4 Cruise, tit. Dev. 93. Pow. on Devises, 634.)

In this case, the Jury have found that the will was torn *animo revocandi*. It cannot be important what part of the will be torn. The seal, though unnecessary to the will, was made a part of it by the testator. The first two or three lines are equally unnecessary, and yet it would not be contended, if these lines had been torn from the instrument *animo revocandi*, the statute would not be satisfied. Although the words of our act of 1789, (*P. L.* 491. 2 *Brev.* 35,) are not precisely those used in the Statute of Frauds, they are so much alike as to make it almost un-

necessary to notice them. The act of 1789, uses the word *destroying*, instead of burning, cancelling and tearing; the former appears to include them all; a will burnt, cancelled or torn *animo revocandi*, is destroyed.

. On the second ground, it is contended that the will was not absolutely revoked; that the seals were torn off, the paper crossed, and interlineations made with the intention of making another will; and that as another will was not made, the tearing of the seals, and the crossing of the paper, and the interlineations are nugatory. But this is contradicted by the verdict. The Jury expressly find that the seals were torn off with an intention to revoke the said will, and not to alter the said will, or with an intention to make another will, as contended. A number of facts are stated in the verdict, the crossing, the interlineations, the directions for another will, that the will was found in a private desk, and so on, from which the Jury deduced the conclusion, that the seals were torn off with an intention to revoke. The testator appears to have preferred another will to intestacy, but it does not appear that he preferred the will in question to intestacy. The will directed, but not executed, was materially different; probably as variant from the one in question as that which the law would have supplied, nor does it appear that the seals were torn from the instrument at the time a new will was directed to be drawn; it may have been long after, when, even the disposition to make another may have subsided. In the case of *Onions vs. Tyrer*, (1 P. Wms. 343,) which is the leading case in this point, there existed no doubt as to the intention of the testator. He had executed his will to pass lands; by a second will, he expressly revoked the first, and likewise ordered it to be torn, which was done. The second will was attested by three witnesses, but they did not subscribe in presence of the testator. The statute of frauds is variant in its provisions respecting the making and revoking of a devise. The 4th clause, as to making a devise, requires attestation in the presence of the testator by the three witnesses.

The 5th clause, as to revoking by will, requires attestation simply by three witnesses. The second will in the case cited, conveyed the land to the same uses with the first, and only the trustees were changed; as the second will had not been attested by three witnesses in the presence of the testator, it was invalid as to land; but as the first will was only revoked for the express purpose of substituting the second, it was decided as the second was not valid for the purpose intended, the first was not revoked. The revocation and substitution were one entire act; they constitute a single declaration of the mind, which could not be garbled without violating a common rule of evidence; but in this case, the directions for the draft of a new will, were not only materially variant from the old will, but were not contemporaneous with the crossing or with the tearing of the seals; the crossing, tearing of the seals, and directions for a new will, were not included in one entire act of the mind; they were not parts of one declaration, and therefore, make a very different case from that of *Onions vs. Tyrer*; and even in this case relief was afforded by the Lord Chancellor, on the ground of accident. The recent case of *Pringle vs. M'Pherson*, (2 Des. 524.) is still more distinguishable from this case. There the testator exhibited no disposition to make another will; he appears to have thought that he could by interlineations, subsequent to execution, alter a devise in his will; the alterations attempted were small; the will was neither burnt, cancelled, torn nor obliterated; the statutory symbols were not only wanting, but the *animus revocandi* did not exist. Upon the whole, I am satisfied that the revocation was unconditional, and that the decree of the ordinary ought to be reversed.

Justices Colcock, Nott and Johnson, concurred.

THE STATE vs. JACOB SONNERKALB.

A person, who sells liquor to a negro without license, may be convicted under the act of 1784, for retailing without a license, and under the act of 1817, for trading with a negro without a ticket, for the same act of selling.

THIS was an indictment for retailing spirituous liquors without a license, tried at Charleston, May Term, 1819, before Mr. Justice *Colcock*.

It appeared from the evidence of Mr. Samuel Dubose, that a negro of his went into the store of the defendant, with some corn and an empty bottle ; that after he entered, the door was closed ; that he heard the corn pour out, and he heard the liquor poured into some vessel. As soon as the negro came out, he took him back into the store, and the defendant admitted, that he had given him the whiskey for the corn, and had sold him a handkerchief for a quarter of a dollar. Defendant acknowledged he had no license to retail spirituous liquors ; on his cross examination, witness stated, that the defendant was the ostensible owner of the store ; he had heard, that one Schroder was concerned in the store ; and he acknowledged, that he had sent the negro for the purpose of detecting the defendant. On the part of the defendant, it was contended, that the indictment would not lie because the act pointed out a specific mode of recovering the penalty, to wit : By " Bill, plaint, or information." The Presiding Judge, being of opinion, that the indictment would lie, the defendant was found guilty. The defendant was then tried on another indictment for trading with a negro without a ticket ; and the same evidence was given on the part of the state, and on the part of the defendant, by ——— ; that the defendant is his clerk ; that the defendant keeps no store except in Pineville ; that the goods and stock in trade are all his and have been his for three years past ; that he gave him permission to trade with all persons.

On this indictment it was contended, defendant could not be convicted.

1st.—Because the defendant was acting for another, and sold under the express authority of his employer.

2d.—Because the master's being present was a license to the slave to trade, and dispensed with the necessity of a ticket.

The Presiding Judge, being of opinion these grounds would not avail the defendant, he was also found guilty on this indictment, and a motion is now made for a new trial, on the following grounds :

1st.—That an indictment would not lie against the defendant, for retailing spirits, without a license, in as much as the penalty imposed by the act of assembly, in such case, was only recoverable in a *qui tam* action.

2d.—That the defendant could not legally be twice punished or indicted for the same act.

3d.—That the defendant could not legally be convicted for trading with a negro, without a ticket, because the witness, his master, testified, that the corn was his, and that he had delivered it to his negro, for the purpose of carrying it to the defendant for sale and barter.

Mr. Justice *Colcock* delivered the opinion of the Court.

The first ground has been so recently settled in the case of the *State vs. John Helfrid*, that it is unnecessary to say any thing on that ; and the third has been considered as settled, ever since the case of the *State vs. Stroud*. The second then only remains to be considered.

At the first view, I confess that the idea appeared to have great weight, but I am satisfied that it is not one act, nor one offence, but if one act, yet that there may be two punishments.

The act of 26th March, 1784, imposes a penalty of fifty pounds on persons retailing spirituous liquors without a license to persons of any description. (*P. L.* 340. 1 *Brev.* 418.) The act of 1817, imposes the penalty of \$1000 and imprisonment on persons dealing, trading or trafficking with a negro without a ticket.

What act then is punished by the first law? The re-

tailoring of spirituous liquors without license, which the defendant did. But the question is, did he do no more? he did—he retailed without a license, to a negro without a ticket; was this necessary to consummate the first offence? It was not, for it is immaterial to whom he does retail, whether to a white or black man, or if to the latter, whether with or without a ticket; if then he did more than was necessary to consummate the first offence, he did more than one act in legal contemplation.

The next enquiry is, whether he committed two offences; and of this there can be no doubt. He sold liquor without a license, in violation of the act of the 26th March, 1784, which was passed in aid of the public revenue; thereby defrauding government—he sold to a negro without a ticket, in violation of the act of 1817, passed to preserve the morals of slaves and to protect the property of their owners, to the injury of all slave holders. But it was urged that as this selling to the negro was one act in point of time, that was sufficient to protect the defendant from two prosecutions; and in support of this (*2 Cowp.* 641. *4 Term Rep.* 809,) were relied on. This position is only correct when time is a constituent or necessary part of the offence, as appears by the case referred to, which was an indictment against a Baker for selling bread on Sunday contrary to a law to prohibit Sabbath breaking; several indictments were preferred for selling several loaves of bread. The Court held that only one could be maintained, because the crime did not consist in selling bread, but in the selling bread on that day. (*2 Cowp.* 641, *Crepps vs. Durden.*)

Again, it was contended, that one of these offences being more injurious to society, and the act prohibiting it, more highly penal; that the minor offence must necessarily merge in the major, as in the case of homicide, proceeding from a blow, the offender cannot be indicted both for the assault and the homicide. This doctrine is only applicable to those cases in which two offences may be committed by one and the same act, in which the minor

as necessarily and conclusively comprehended in the major. But in this case it has been shown, that the defendant committed two acts, and that they are so wholly unconnected and distinct, as not to be comprehended, the one within the other.

But let it be admitted, that the defendant committed physically but one act; two offences may be committed by one act, even at the Common Law; a person fires a gun, kills one and wounds another, if he escape for the homicide (that is, if his life be not taken,) he may be indicted for the assault on the other; or suppose he severely wound two, he may be indicted for two assaults. Again, the legislature pass a law imposing a penalty of \$100 on one who fires a loaded gun or pistol in the city. One does fire a loaded pistol and wounds a citizen; he may be indicted for the assault, and the penalty both; yet here is clearly only one act.

Motion dismissed.

Justices Bay, Nott, Johnson and Huger, concurred.



**COURSE & M'FARLANE, Indorsees of Roger Shackleford,
vs. ADMINISTRATRIX of Roger Shackleford.**

The indorsee of a promissory note cannot recover of the indorser, unless he prove a demand made upon the maker, and notice of nonpayment to the indorser: And there is no difference in this respect between a note indorsed before and after it became due.

The insolvency of the maker of a promissory note, will not dispense with the necessity of a demand, and notice to the indorser of nonpayment.

TRIED before Mr. Justice Nott, Spring Term, 1819, at Georgetown.

This action was brought on the indorsement of a note of hand given by Davis and Evans, the 18th of July, 1809, to Wm. M'Kenzie, or order, payable sixty days after date.

It was indorsed in blank by *William M'Kenzie* to *Robert Cooper*, and in April, 1810, came into the hands of defend-

ant's intestate by delivery, and not by the indorsement of the then holder. In the fall of the same year, defendant's intestate indorsed it to the plaintiffs.

Robert Cooper swore that *Davis* and *Evans* failed sometime in the year, 1810, after he had passed the note to *Shackelford*. *Major Carr* swore, that sometime in the year 1813 or 1814, the plaintiff commenced an action in Georgetown against *Mr. Shackelford*, on this indorsement. He was employed by *Shackelford* to defend the suit.—After the action was commenced and while it was pending in court, *Davis*, one of the firm of *Davis and Evans*, came into Georgetown. *Shackelford* then applied to *Major Carr* to issue a writ against him, which he did, but whether that writ was actually served, or whether *Davis* ever knew, that it was issued, did not appear.

The evidence being closed, a motion was made by defendant's counsel for a nonsuit, on the ground, that no notice had been given to the defendant's intestate or to herself, of a demand on the drawers of the note, and a refusal to pay by them; which was granted by the Presiding Judge, and a motion was made to set aside that nonsuit; in support of which, the following positions were taken:

1st.—That when a note is indorsed after it became due, no demand of payment from the maker is required, nor notice to the indorser, that it has not been paid.

2d.—If such demand and notice are necessary in ordinary cases, the insolvency of the parties rendered it unnecessary in this case.

3d.—That the issuing of a writ by defendant's intestate was sufficient evidence of a demand, and of his knowledge that *Davis* and *Evans* had refused payment.

Mr. Justice Nott delivered the opinion of the Court.

The first ground in this case appears to be bottomed on a *dictum*, which has somehow found its way into our courts, that a note over due has lost its negotiable qualities; and that the court is not to be governed by the same rules of

decision with regard to it as in other cases of negotiable instruments. But that opinion, I think to be founded in error; I can find no case in support of it, neither can I see any good foundation for it in principle. It appears to me to be an unauthorized inference drawn from the rule laid down in the case of *Brown vs. Davies*, (3 D. & E. 80.) But all that the court decided in that case was, that negotiating a note after it became due, "gave rise to suspicion," and entitled the drawer to the same defence against the indorsee, as he was entitled to against the original payee. And that, I believe, is as far as any of the cases have gone, except perhaps, that the same diligence as to the time of the demand will not be required, there being no time fixed within which it must be made. But in that case, as also in the case of *Taylor vs. Mather*, mentioned in a note, it is expressly laid down, that the note still remains negotiable. Indeed were it not so, the plaintiff would not be entitled to an action. For it has been decided in several late cases in this court, that the blank indorsement of a paper not negotiable creates no obligation on the part of the indorser. (*Tod vs. Twitty*, 1 Nott & M'Cord 261. *Robert Walker vs. Scott*,—a.) But if the endorser is to be ultimately liable, and the contrary is not pretended in this case, a demand and notice are necessary. And so it was decided in the case of *Descoudres & Crovat ads. Eifert*, in this court, (1 Constitutional Rep. 69.)

2d.—It did not appear that Davis & Evans were insolvent. The witness said, they had failed; but that was not conclusive evidence of insolvency; and even insolvency will not dispense with notice. (*Young vs. Price*, 1 Nott & M'Cord 438. 1 Selwyn 353. *Lovell on Exchange* 168. *Doug.* 683, *Ruston vs. Aspinall*.)

3d.—The issuing of a writ by Shackleford, was no evidence of notice, because it was after he was sued, and it did not appear, that the writ issued by him was served. So that there is no proof even to this day, that any de-

The defendant then has not, by the words used in this assignment, entered into any express agreement to be responsible for the solvency of the obligor.

But it is said, the words are such as constitute a bill of exchange, and hence we are to infer, that it was the intention of the defendant to become responsible for the solvency of the obligor. But this inference is, in my opinion, in direct opposition to the fact; for although no particular set of words are necessary in the construction of a bill of exchange; yet it is most obvious that the words on the bond could not have been intended so to operate, for they have a direct relation to the bond itself; "pay the within bond," are the words used which is not an order to pay a specific sum of money. It was said "*id certum est quod certum reddi potest*;" but does not the event of this transaction show, that the maxim is not applicable to it. It does not comport with the usual method of doing business to draw a bill of exchange on the part of a bond, and it may therefore be considered as a forced construction of the intention of the parties to suppose that it was intended so to operate.

I will now enquire whether the case imposes an obligation on the defendant to be answerable for the solvency of the obligor? The mere endorsement on an instrument not negotiable in its nature, cannot create such liability, and it cannot be contended that bonds are negotiable. The act of our own legislature (*2 Faust, 215. 1 Brev. 90.*) which enables an assignee to sue in his own name, does not make them so, nor have they ever been so considered at the Common Law. But it is said that whatever may have been the intentions of the party, that he has drawn a bill of exchange, and is consequently subject to all the liabilities imposed by the Law of Merchants. I have shown that the words cannot be so considered, because they want one of the essentials of a bill of exchange. Admit it however to be such, the plaintiff cannot recover; for if it be so considered, certain duties are imposed on the plaintiff, which he has not performed. He was bound to make an immediate application for payment, and to give notice to the drawer. It does not appear that he ever applied to the obligor in his lifetime. No reason has been given, why he did not apply, and there is nothing to satisfy the Court that the defendant could not have obtained payment if he had received notice. It was said however, that notice was not necessary, the bond being over due; but this is considering the bond as negotiable, which I have shown is not the case. If the indorsement is to be considered as a bill, it must be viewed as a new contract without relation to the bond, as a bill payable out of a particular fund at sight, and then notice is indispensably necessary.

It has been long the settled doctrine of this state, that a sound price requires a sound commodity; but it has always been applied to goods or effects of some intrinsic worth; to articles the nature of which is fixed and certain. It is obvious that the nature of a bond is always

uncertain. Such is the mutability of human affairs, that a man may be solvent to-day and insolvent to-morrow. It sometimes happens, that a man who owes twice as much as he possesses, will preserve his credit as long as he lives. The nature of such a man's bond depends on his life, than which nothing can be more uncertain. Nor is the full value ever given for a bond. That is, the amount of the bond is never paid in cash; for then there could be no profit.

Upon the last count, I think, the plaintiff cannot recover. It is said, that where a consideration fails, the action for money had and received, will lie. But it does not appear, that the consideration has failed, or if it has failed, that it was not through the plaintiff's laches. I say it is not proven, that the consideration has failed, because the return of "nulla bonu" is not evidence of the insolvency of the obligor. I do not hold it to be even *prima facie* evidence of insolvency. I mean not to say any thing, as to the irregularity of the return as affecting the case, for it does not require it, though I cannot forbear expressing my disapprobation of the loose and irregular manner in which the process of our Courts is generally returned. Had the execution been regularly returned and sworn to, it would not be considered as evidence of insolvency, because it is well known that such returns are often made, (though irregularly) when executions are sent too late. But it is made where a defendant possesses a large estate, but may not be in the district to which the execution is sent. A man may be rich in money or stock, which a sheriff may not be able to ascertain or lay hold of. There has not then been proof of such a failure of consideration as would authorize a recovery on the count for money had and received. The case of *Bay vs. Freazer*, is the first of its kind to be found in the books, it is a Circuit decision and is overruled by the case of *Parker vs. Kennedy*.

Upon the whole, I think the plaintiff cannot recover. The verdict must remain, and the motion is discharged.

A majority of the Court concurred.

Mr. Justice *Not* dissented:

It is my misfortune to differ from all my brethren on the principal question made in this case. I do not know what might have been my opinion, if the question had never before occurred. But I consider the point decided by the case of *Bay vs. Freazer*, and I do not think that case overruled by the subsequent case of *Parker vs. Kennedy*.

I admit, that a common assignment of a bond in the usual form implies no warranty of the solvency of the obligor. The purport of it by the terms in which it is expressed, is nothing more than a transfer of the right of the obligee. But a departure from that manner of assignment or transfer, authorises the inference, that something more is intended, and that intention must be looked for in the form of the indorsement itself.

The common form of an assignment of a bond is to the following

effect: "I assign all my right, title, and interest, in and to the within bond to A. B. &c." But in the case of *Bay vs. Freazer*, it was as in this case. "Pay the within to A. B." The first, I have already said, subjected the assignor to no liability. The legal implication of the latter is an ultimate responsibility. Suppose, to the first, the obligee had added "and I guarantee the payment of the same," could there be any doubt that he would be bound by it? And if such an undertaking is necessarily implied from the legal import of the indorsement, the obligation is as strong as if it was expressed. The indorsement in this case is in the form of a bill of exchange, and it will not be denied, that a bill of exchange creates a liability on the part of the drawer to pay in the event of refusal or insolvency, on the part of the drawee. And whether written on the back of a bond or on a piece of blank paper, I should be of opinion, the legal operation of the words would, in that respect, be the same.

Suppose a person should write a promissory note on the back of a bond, would he not be liable to pay it? The liability of the drawer of a Bill of Exchange, is as great as that of the maker of a promissory note, with this difference only, that the liability of the maker of a note is immediate and direct, that of the drawer of a Bill of Exchange, remote and contingent. I think therefore, that the case of *Bay vs. Freazer* was settled upon strict legal principles. In the case of *Parker vs. Kennedy*, the obligee had made a blank indorsement, and a majority of the Court held that such an endorsement did not make him liable. They do not say the case of *Bay vs. Freazer* is not law. The inference is, they did not consider the cases analogous. Mr. Justice *Grimke*, in the opinion which he gave in the case of *Parker vs. Kennedy*, recognizes expressly a distinction between indorsements and assignments. But I am not aware of any distinction except what arises from the form and effect as above stated. From whence I conclude that Judge *Grimke* concurred in the case of *Bay vs. Freazer*, and also in the case of *Parker vs. Kennedy*, considering one as not conflicting with the other.

But it is said that a blank indorsement creates the same liability as one which is filled up; that it authorizes the indorsee to write above the name whatever he pleases. It would be a sufficient answer to that observation, to say that our Courts in the cases above mentioned, have decided that there are exceptions to that rule. Indeed, I apprehend that the difference of opinion is owing in some measure to the unqualified terms in which that rule is usually laid down. I do not hold that the indorsee of a Bill of Exchange can fill up a blank indorsement in any form he pleases. He cannot for instance fill it up for a sum double the amount of the bill itself. He is not permitted to write above it an unconditional promise to pay the amount of the bill without first calling on the drawee. He is only authorized to fill it up in the manner prescribed by the custom and usage of merchants, or in other words, he can only fill it up in a manner consistent with the nature of the instrument on which it is made and the implied intention of the indorser

And such is the decision in the case of *Parker vs. Kennedy*. The usual method of transferring bonds, is by assigning over the right of the obligee to the assignee to sue and collect the money to his own use, and the Court decided that a blank indorsement on a bond, only conferred an authority on the holder to fill it up according to the usual and accustomed form of assigning such instruments, and therefore no liability was created. But it is not to be inferred from thence that it may not be indorsed in such a way as to make the indorser liable.

It is not my intention to enter into a defence of the decision in the case of *Bay vs. Freazer*, after the very able opinion of Judge *Waties*, in the case of *Parker vs. Kennedy*, on the subject. But considering the question settled as far as that case goes, I think the decision ought to be supported,

It is not necessary to give an opinion on the other points made in this case.

JOHN H. SCHRODER vs. JAMES EASON.

Where a defendant has placed the copy of a Sum. Pro. with an attorney, with instructions to make a defence, and the attorney neglects to enter an appearance, and judgment goes against defendant by default, the court will not set aside the proceedings and permit him to enter an appearance after the adjournment of the court.

THE brief, in this case, states, that the process was served on the defendant, who brought it to his attorneys, prior to the meeting of the court, paid an appearance fee, and instructed them in a defence. At the time of leaving the copy, the attorneys marked on the face of the process, "appearance to be entered," and on the back, the substance of the defence. Accidentally the names of the attorneys were not entered on the docket, but the copy was put into the bundle of cases ready for trial.

The case was called between nine and ten o'clock, in the morning, when the bar were not present; and the plaintiff's attorney, not being aware of a defence, called for a decree, which was given, although the account was not strictly proven, and was on its face illegal. It was not discovered until after the adjournment of the court, and execution lodged, that this error had been committed,

when application was made to his Honor, Mr. Justice Bay, to set aside the execution and decree, which was refused;

An appeal was made to reverse the decision on the grounds :

1st.—That this being a case within the process jurisdiction, all cases of mistake or accident can be redressed by motion in the nature of a bill of review.

2d.—That the copy process was left with the defendant's attorney, to appear and defend it, prior to the meeting of the court; and it was wholly owing to mistake, that the appearance was not entered.

3d.—Because the case was called out of the regular order of the docket, when the defendant's attorneys would have been ready to have attended to the defence.

4th.—Because, for the same reason, no opportunity was given to appeal from the decision, which, it is contended, was erroneous.

Mr. Justice *Colcock* delivered the opinion of the Court.

Upon the first ground, there is no rule of law or practice, by which the court is authorized or permitted to review a decision made or decree given, in a case under the process jurisdiction, in any other way or manner, than is pursued in cases under its higher jurisdiction.

The rules of court require the defendant to enter his appearance, and file his defence on or before the first day of the court, which, it is admitted, was not done. It is true, that where this is neglected, and the omission is discovered, before the cause is called for trial, the court, upon proper affidavits, have permitted the defendant to plead, provided, he did not thereby delay the plaintiff. But to suffer this after judgment, and after the rising of the court, would lead to endless litigation and delay, and be productive of the most mischievous consequences. Where a defendant has in his possession a receipt which he neglected to give in evidence on a trial, the court will not grant a new trial, or even permit an action to be brought on it

afterwards. (*Grimke vs. Wilder, Marriott vs. Hampton, 2 Esp. N. P. c. 547, 1 Wils. 98, 2 Johnson's Cases 282.*)

As to the third and fourth grounds, the court settled the order in which the business would be conducted, and announced to the bar an intention to meet at nine for the express purpose of taking up the process docket, and trying the cases thereon, until ten o'clock, and pursued the practice and adjourned the court to nine on each day.

The last ground charges, that the decision, by which is meant the decree, was erroneous. The error is not specified, nor was it stated in argument. But it is deemed proper to state, that the case was treated as a judgment by default, and such evidence as is usual on those occasions, was produced. And the court, when they have the power to review proceedings, will never do so, unless the applicant show by satisfactory affidavits, that he has a good and legal defence, of which he might avail himself, on a second hearing.

The motion is dismissed.

Justices *Bay, Nott, Johnson, and Huger*, concurred.



REBECCA SCOTT, widow of Wm. Scott, junr. deceased,
demandant, vs. MORDECAI COHEN.

If a man seized of lands, dies, leaving no issue or relations behind him capable of inheriting, his lands shall escheat to the state, rather than go over to aliens: but where there is any one of his blood capable of inheriting the fee of the lands, they shall go over to that one in preference to all others, nearer in degree, who are aliens.

A. a naturalized citizen of the United States, who was possessed of a considerable real estate in this country, by will devised a large estate in Ireland, to his brothers and sisters, &c. and by the residuary clause, devised all his other property to his brothers and sisters, and their children, share and share alike, and appointed trustees (who were aliens) to sell, &c. B. one of the legatees, and a naturalized citizen of the United States, claimed all the lands in the United States, as the only one of the legatees, who could take by descent, the rest being aliens, Held that on the death of A. all his real estate in this country, vested in B. and that after the death of B. his widow was

entitled to dower in the same, although B. had in his lifetime agreed that the other legatees might come in and take their shares agreeably to the will of A.

THIS case came before the court of common pleas, upon the claim of the demandant, for her dower, in a lot of land, in King-street, in the possession of the defendant, of which it is alleged, her husband had died seized.

Upon the return of the summons which had issued upon the petition, the defendant came in and pleaded, that the demandant was not entitled to dower, in the lot of land in question, as her husband had not, at any time, during coverture, been seized or entitled to the premises in question.

Upon which an issue was made up, and the cause went to the jury in October Term last, to try that fact.

Upon the trial, the certificate of the Revd. *Doctor Flinn* was produced and admitted, that the demandant was married to *Wm. Scott*, junr. in the month of ——— 1809. It was then stated and proved, that *William Scott*, the uncle of the demandant's husband, emigrated to America, and settled in South-Carolina, not long after the revolution, where he became a naturalized citizen, and acquired a considerable real and personal estate, of which the lot in question in King-street, formed a part. That after residing in South-Carolina several years, the said *William Scott* returned again to Ireland, leaving his nephew *Wm. Scott*, the younger, who had likewise become a naturalized citizen of the United States, his agent in South-Carolina, to receive the rents and profits of his lands, and to manage his other concerns during his absence in Ireland. That soon after the return of the said *Wm. Scott*, the elder, to Ireland, he departed this life, having first made his last will and testament in writing, by which he devised a large estate in Ireland to and among his brothers and sisters, in that kingdom, and their children and legal representatives, and bequeathed divers legacies to and among them, as stated in said will: And in the residuary clause of his said will, (after the specific devises in his said will mentioned,) he devised all his other property to and among his

brothers and sisters, and their children share and share alike ; leaving *Thomas Scott* and *John Scott*, his executors and trustees under his said last will and testament. That after the death of the said *Wm. Scott*, the elder, in Ireland, the above named *Wm. Scott*, the younger, (who was also one of the legatees mentioned in his uncle's will,) claimed the whole of the real estate of his said uncle, in this country, as the only naturalized citizen in South-Carolina, who could take the lands of his uncle by descent, and entered upon them, and received the rents and profits of them to his own use. That the trustees and legatees in Ireland, finding, that the said *Wm. Scott*, the younger, after the death of his uncle, had claimed the whole of his uncle's landed property after his death, the said executors and trustees above mentioned, on behalf of themselves and the other legatees and devisees in said will mentioned, filed their bill in the court of equity, in the said state of South-Carolina, to compel the said *Wm. Scott*, the nephew, to account for the rents and profits of the said lands, and to have the whole of them sold, and the proceeds divided among the said legatees, share and share alike, agreeably to the terms of the said will. To this bill of complaint filed against him, the said *Wm. Scott*, the nephew, came in, and by his answer, admitted, that after the death of his uncle, he had entered unto and upon all his said uncle's landed estate, in South-Carolina, and had received the rents and profits of the same, but contended, that by law, he was entitled to the same, as the only naturalized citizen in America, capable of taking by descent, and that the residuary clause of his said uncle, as to all the lands in South-Carolina, was null and void, as it regarded or related to the devisees and legatees in Ireland, who were aliens. Whereupon the said court of equity, after hearing all the parties and their counsellors and solicitors, by their solemn decree, adjudged and declared the said lands, which had belonged to the said *Wm. Scott*, the elder, in his life time, did not pass under the residuary clause in his said will, but of right, did descend to and go over to

the said *Wm. Scott*, the nephew, as a citizen of the United States of America, and therefore the said court dismissed the said bill filed by the executors and trustees, in the said will mentioned. After the said decree had been pronounced and adjudged in favour of the said *Wm. Scott*, the nephew, he generously came in, and voluntarily offered (out of respect to the memory of his uncle, and his affectionate regard for his relatives in Ireland,) consented, that the said lands should be sold and divided among the said legatees, agreeably to the intentions of his said uncle; which consent and agreement was afterwards confirmed by the said court of equity. In consequence of which a decretal order was made for the sale of the said lands which had belonged to the said *Wm. Scott*, in his life time, and the proceeds to be divided according to the agreement of the said *Wm. Scott*, the nephew. In pursuance of which decretal order, the master in equity did proceed to sell nine lots of land in King-street, which had belonged to the said *Wm. Scott*, the elder. At which sale the defendant, *Mordecai Cohen*, became the purchaser of the lot of land in question, No. 292; in King-street, at and for the sum of \$4,500; this sale was made in the month of January, 1817, and some time in the said year the said *Wm. Scott*, the nephew of the said *Wm. Scott*, the elder, departed this life.

To the Jury, it was urged by the demandant's counsel, *Mr. De Saussure*, that it was evident from the foregoing premises, that the abovementioned *William Scott*, the younger, held the bond in question by a two fold title.

1st. By the rules of the Common Law, as he was the only person in Carolina who could take by descent, being the only naturalized American citizen—And,

2d. That he held under a decree of the Court of Equity, which had confirmed the title in him, consequently, he was in his lifetime seized and possessed in law of the premises in question, so as to give his widow a just claim to dower; and there was nothing in the whole case which deprived her of it. That his consent and agreement, af-

terwards confirmed by the Court of Equity, could not amount to any thing more than a gift or a sale, which would not in either case bar the demandant of her claim of dower.

Mr. *Lance* and Mr. *Simons*, contended, that as *Thomas Scott*, one of the brothers of *William Scott*, the elder, had been in Carolina some years before his brother, *Wm. Scott*, the elder, went to Ireland, and had returned again and was believed to be an American citizen, he would have taken by the rules of the Common Law in preference to *William Scott*, the younger: (But there was no positive proof, that he had ever been made a citizen; only belief.) That the decree of the Court of Equity was not conclusive on points not submitted to it, nor between parties not before them, when the case was determined, and therefore that this case was still open for investigation. That the estate was a trust estate, and not absolute, and therefore never could vest in *William Scott*, the younger; further, than that he held in trust for the legatees; and it was clear that a widow is not entitled to dower in a trust estate.

The case then went to the Jury under the charge of the Judge in the Court below, and the Jury found a verdict for the demandant, with costs.

The present was a motion for a new trial for misdirection in the Judge, who charged in favor of the demandant both upon the rules of the Common Law and the confirmatory decree in Equity, and as a verdict against Law and evidence.

Mr. Justice *Bay* delivered the opinion of the Court.

This case has undergone a second investigation in this Court, where all the arguments urged on the trial below have been again repeated, and some additional ones brought forward, against the demandants claim of dower. (1 *Nott & M'Cord*, 413.) But after the fullest examination, I can see no ground to disturb this verdict.

There is no better rule established in the Common Law, than the one contended for in this case, that if a man, seized of lands, dies, leaving no issue behind him, nor collateral relations capable of inheriting, his lands shall escheat to the state, rather than go over to aliens. But where there is any one of his blood capable of inheriting the fee of the lands, they shall go over to that one, in preference to all others, who are nearer to him in degree, who are aliens ; in which case the lands shall not escheat, but vest in him who is capable of taking. In the present case, upon the death of *Wm. Scott*, the elder, all his near relations were in Ireland, (who were incapable of inheriting,) but one who was *Wm. Scott*, the younger, his nephew, who was in South-Carolina, and who had been made a citizen. Something was said on the trial below, about *Thos. Scott*, the brother, who had been in America ; and he was believed to have been made a naturalized citizen, but there was no actual proof of it ; and he was, at the time of his brother's death, and still is residing in a foreign country.

But if any doubt could arise upon the construction of the common law, surely none can remain now after the decree of the court of equity. That is certainly the highest court of judicature in Carolina, in as much as it in many cases controls the courts of common law. All the parties were before that court, and their claims and pretensions to this very land in dispute among others, were before it, and fully investigated ; and after mature deliberation they decreed the lands of old *Wm. Scott*, the uncle, to have become vested in *Wm. Scott*, his nephew. This court is bound by that decree. We cannot unravel it or presume to say it was not founded in law and justice. On the contrary, the respect due to so high and solemn a tribunal, compels us to submit to its decrees: And in the case of *Stark vs. Woodward*, (1 Nott & M'Cord 259,) lately determined at Columbia, the same doctrine was laid down, and determined by the unanimous assent of all the judges.

Upon the whole, there does not appear to be any ground for a new trial.

Justices *Colcock, Johnson, Richardson, Nott, and Huger*, concurred.

WILLIAM VANCE vs. J. J. REARDON.

To make out a title to personal property under a sheriff's sale, the production of the execution, under which the property was sold, is indispensable.

Under the act of 1721, authorizing attested copies of all records certified by the clerks of the court to be given in evidence, it will not be sufficient to produce extracts; the whole record must be given.

TRIED before Mr. Justice *Colcock*, Charleston, May Term, 1819.

This was an action of trover to recover the value of a negro slave, Joe, alleged to be the property of the plaintiff, and to have been converted by the defendant to his own use, in which the plaintiff had a verdict for the value of the negro, &c.

The property in Joe, was originally in *William Harville*, and both parties claimed under him; the plaintiff under a sheriff's sale alleged to have been made by virtue of an execution founded on a judgment obtained in the court of common pleas, at Orangeburgh, in October Term, 1806, at the suit of *Robert Tuttle vs. Harville*, and produced a paper purporting to be an exemplification of the proceedings, certified by the clerk. It contained a literal copy of the process, (being within the summary jurisdiction,) the judgment and the first execution. This execution was for \$95, including debt, interest, and costs, and was entered in the sheriff's office the 5th November, 1806. It did not appear, that there was any formal return on this execution, but an entry that the 2d execution was signed March Term, 1807, and upon inspection, the following indorsement was also found, "December 30th, 1806, Received \$40. January, 1807, Received \$70." (This fact was not

stated in the brief, nor was it noticed in the argument, and it is not known, whether it is susceptible of explanation or not.) Instead of a literal copy of the second execution, the clerk furnished only an abstract containing the names of the parties, the amount of debt, interest, and costs, with a memorandum of an entry in the sheriff's office, 2d July, 1808; and a return of *nulla bona* without date; and also, that a 3d execution was signed, 19th March, 1808. There was also a similar abstract of a 3d execution, entered in the sheriff's office, 19th March, 1808, on which the following return was stated to have been made, "levied on a negro man named Joe, sold the same on the 4th April, 1808, purchased by *William Vance* for \$ 251 10." The plaintiff also gave in evidence a receipt for the purchase money from the sheriff and a similar exemplification of another judgment against *Harville*, at the suit of the same plaintiff, obtained in the same court at the same term, for \$ 36 68. An original, *Alias* and *Pluries, Fi. Fa.* were found, that like the former contained a copy of the process, judgment and original execution, and only an abstract of the *Alias* and *Pluries Fi. Fa.* in the manner before mentioned, but it did not appear, that any levy had been made on any of these. The certificate of the clerk to these exemplifications was in these words: "I, *Samuel P. Jones*, clerk of the court of common pleas, for the district of Orangeburgh, do hereby certify, that the two sheets of paper hereunto annexed, do contain a true copy (or extract) of the proceedings in a certain cause, wherein *Robert Tuttle* is plaintiff and *William Harville* is defendant, &c." The plaintiff also proved a conversion by the defendant.

Upon closing his evidence, a motion was made for a nonsuit by the defendant, on the ground, that the exemplification was only legal evidence so far, as it professed to give a copy of the proceedings, and there being only an abstract of the execution, under which the sale (if any) was made, the plaintiff had failed in the proof of property.

This motion was overruled, and the defendant proved,

that the negro, Joe, had been delivered by *Harville* to his wife (late *Mrs. Hamilton*,) in January, 1807, before their intermarriage, and produced a bill of sale from him to her, dated the April following, reciting, that the sale had been made in January, and acknowledging the receipt of \$ 350 as a full consideration.

On the part of the plaintiff, it was alleged, and evidence was given to show, that this sale was intended to defraud the creditors of *Harville*, and indeed, that Joe was only put into the possession of *Mrs. Hamilton*, to keep him out of the way of the sheriff. It also appeared, that he had been in her possession, and the defendant's, after their intermarriage for some time, and that the plaintiff obtained possession without their consent for the purpose of having these executions levied on him, as he was interested to see them satisfied, having been the bail of *Harville* in those cases, and some time after the defendant regained the possession without plaintiff's consent.

The defendant moved for a new trial on the following grounds :

1st.—Because the court below ought to have ordered a nonsuit on the grounds taken there.

2d.—Because the court erred in admitting the exemplification in the form presented as evidence of the second and third executions.

3d.—Because the verdict was, in other respects, contrary to law.

Mr. Justice *Johnson* delivered the opinion of the Court.

That a plaintiff must recover upon the strength of his own title, and not the weakness of his adversary's, is a rule which I believe, admits of no exception, and it is, I think, equally clear, that the naked possession of a personal chattel is *prima facie* evidence of property, and good against all the world, except the rightful owner. (*Phillips*, 118-19).

The defendant's wife, and after their marriage, the de-

fendant himself, had the possession of Joe, with the consent and under a Bill of Sale from Harville, who was the acknowledged owner, and whether fraudulent or not, is not a matter of any consequence as regards the fact of possession: It gave him the right to hold until some one claiming by a title paramount should claim the possession, and consequently a right to retake if he was divested by any other means. And this leads to an enquiry as to the legality of the title set up by the plaintiff on the trial below.

In considering this question, I will begin by noticing the sheriff's receipt for the money bid by the plaintiff for the negro Joe, at a supposed sale. This it is insisted is *prima facie* evidence of the authority of the sheriff to sell, and put the opposite party to the proof of the negative. This question, is, I think, conclusively settled by this Court in the case of *Barkley vs. Scriven*, (1 vol. 408) in which it was determined, that although it was not necessary to produce all the executions intervening between the judgment and that under which the sale was made, the latter was indispensable, as the authority under which the Sheriff acted, and that the judgment on which it was founded, ought also to be introduced. It is true, that in that case, lands were the subject of litigation, but I am unable to see any reason why the rule will not equally apply to personal estate. If it were otherwise, the whole property of the community would be at the mercy of a sheriff. This process runs through the whole state, and to compel a party to search and procure certificates from the office of the clerk of every district in the state would be unreasonable, whereas, if he who sets it up, is required to produce it, the execution under which he purchases points directly to the office where it is to be found. This argument must therefore fail.

The next question arises out of the admissibility of the exemplifications so far as they profess only to give *extracts* of the proceedings in relation to the 2d and 3d executions, under the latter of which the levy and sale is al-

leged to have been made. This enquiry is wholly superseded, if the memorandum endorsed on the first execution of the receipt of two sums amounting to \$110, when only \$95 was due, is not susceptible of explanation; for, if that is to be regarded as evidence, the execution was more than satisfied, but as it has not been noticed in the argument, it may become necessary to consider the ground taken.

At Common Law, the copy of a paper writing could not be given in evidence when the original was in existence and in the power of the party; but the act of the legislature of 1721, (*P. L.* 117. 1 *Brev.* 315,) authorizes attested copies of all records certified by the clerks of the Courts, to be given in evidence. When an act of the legislature is in abrogation of the Common Law, it is to be strictly construed, and even without the aid of this rule it appears to me obvious that the legislature never intended by the term *copies*, to make *extracts* evidence; the terms themselves are of different import, and besides the mischiefs of confounding them appear to me too manifest to need exposure. A party is not presumed, nor is he bound to know what evidence his adversary will adduce against him; and if he be permitted to extract from a record only so much as he may deem necessary to his own side of the question, and to give it in as evidence, he will always take care to leave out that which makes against him. By the same rule, the opposite party would have the same right to extract so much as was subservient to his side of the question, which, from the specimen of extracting, furnished by this case, would produce inexplicable difficulties. Thus, in this case we find that on the first *Fi. Fa.* when only \$95 was due, \$110 had been paid, and yet an *alias* issued, and also a *pluries*; and as if to force conviction upon me of the necessity of a literal copy, the extract represents the *pluries* to have been entered in the sheriff's office on the 19th March, 1808, and the *alias* which must necessarily precede it, as having been entered on the 2d July, 1808, nearly four months after.

But it has been argued that these extracts were admissible as *prima facie* evidence of the existence of such judgments and executions. I confess I do not understand how this sort of evidence can apply to a case when the Court sees from the evidence produced, that better and more ample proof of the fact does exist, and is in the power of the party, and appears to me to be at war with that universal rule, that the best evidence should always be adduced, and can only apply when there is no higher evidence.

I think therefore, these abstracts were inadmissible, and if admitted they proved nothing, and that the motion ought to be granted.

Justices *Nott* and *Huger*, concurred.

Mr. Justice *Colcock* dissented :

This was an action of Trover, to recover a negro. The plaintiff produced a Bill of Sale or receipt from Timothy Barton, Sheriff of Orangeburgh district, and also an exemplification (or that which was called and considered as such) of a judgment and three executions which had been lodged in the Sheriff's office of Orangeburgh district, at the suit of *Robert Tuttle vs. William Harville*; and he proved that he had been three years in possession of this negro by virtue of a sale, which, as it was contended, appeared by these executions and the testimony of Mr. ———. Also he proved that *Harville* had been in the possession some years anterior to his, (plaintiff's possession,) and that he was then considered as his property, and an actual conversion by the defendant.

The defendant's counsel moved for a nonsuit, on the grounds as stated in the notice given to me, and as argued on the trial before me. 1st. Because the plaintiff rested his claim entirely on the sale by the sheriff of Orangeburgh district, and the possession under it, and no execution was offered in evidence; and 2d, Because the exemplification, if admissible evidence, showed an irregularity in the proceedings which was explicitly animadverted upon

and pointed out; which motion I overruled. And a motion is now made for a new trial on the ground, that a nonsuit should have been ordered, and for other grounds which it is not necessary to notice, because the motion is granted by my brethren on this ground alone, and because on the trial of the case, I was on the other grounds stated, inclined to think that a verdict ought to and would have been found for the defendant.

On the ground that a nonsuit should have been granted, I am constrained to differ from my brethren.

I lay it down as a position not to be controverted, that in an action of trover for the recovery of a negro, that the production of a bill of sale by the plaintiff to himself, stating a valuable consideration, and upon its face, fair and unexceptionable, with proof of its execution, and a conversion by defendant, is sufficient evidence, unless rebutted, to entitle him to a recovery; and in ninety-nine cases of one hundred, tried and determined in our courts, it is all that is produced in the first instance by a plaintiff. If authority be necessary, I refer generally to 2 *Sel. N. P.* 1266, wherein it is expressly laid down that an absolute or special property with a right of possession is sufficient to maintain this action; that is, it is sufficient if not opposed; it is sufficient to put the defendant to the proof of a better title. Yet, further, the bare possession is sufficient. The finder of goods may maintain this action; what would be his proof? The possession and a conversion by the defendant. Here was proof of a possession, and an actual taking of the negro and sale of him by the defendant.

But if it were necessary to the support of plaintiff's case that the exemplification should be considered as complete, I conceive by a critical examination of it, it will be found to be so.

The Clerk of the Court, the keeper of records, first sets forth the process *verbatim et literatim*, then states all the matter contained therein; thus entered, "February 21st, 1806, TIM. BARTON, s. o. d;" next the return of the sheriff in his own words; next the proof of that return be-

fore *L. Lestarjette*, the clerk of the district ; next the decree of the court for the amount of the note and interest ; then the usual endorsement of the time of issuing the execution, viz. 29th October, 1806 ; he then sets forth *verbatim et literatim*, the judgment and execution which is according to the form of proceeding in our courts, which is followed by these words : Endorsement on the execution, which is a detailed statement of the debt and costs, and the words "entered November 5, 1806. T. BARTON, s. o. d." Then he adds without repeating the words of the execution, "2d Execution, signed March Term, 1807 ;" endorsements on the 2d execution, which are as on the first, a statement of debt, interest and costs, and "entered July 2, 1808. T. BARTON, s. o. d. *Nulla bona*." 3d Execution "signed March 19th, 1808. *Nulla bona*," a statement as before of debt, interest and costs, "entered, March, 1808. T. BARTON, s. o. d." and these words, "March 19th, 1808, levied on negro man named Jqe, sold the same on the 4th April, 1808, purchased by W. Vance, for \$251 10. T. BARTON, s. o. d." Then followed the certificate of the clerk, *Samuel P. Jones*, in which he states that the paper contains a true copy or extract of the proceeding as appears by the records remaining in his office. From this it is apparent that the officer professes to set forth all that is within and without the papers in the case, except that he does not repeat the words of the second and third executions. And this I did consider, and still do consider as wholly immaterial, for if it had been found upon their being set forth, that there had been any error, it was amendable and would be amended by the court to perfect the sale ; see the case of *Toomer vs. Purkey*, (1 *Con. Rep.* 323,) which is only a repetition of what has often been decided in our courts. Now if it is immaterial whether the words were those which according to the forms of our proceedings, ought to have been used, I am at a loss to conceive why they should have been put down to the great trouble of the officer and expense of the party.

Again, is there any prescribed mode and form of exemplification? I know of none. It is admitted, that in exemplifications the whole is exemplified. But much depends on the purposes for which they are to be used. It is said something is kept back. I ask, if the officer does not say what that is? I think he does, as plainly as if he had said, that I deem it unnecessary to repeat the body or formal part of the execution; but I give you all the endorsements thereon, and these, it is to be observed, cite the only important parts of the execution.

The case of *Barkley vs. Scriven* is relied on as authority to show, that the execution must be produced to support a claim of personal property acquired by a sheriff's sale. But that was an action to recover real estate, and the observation of the judge was only incidental and not to the point before the court, and therefore cannot be considered as authority.

It was further contended, that, as the plaintiff in this case, had proved possession in *Harville*, it was incumbent on him to show, that *Harville* had been dispossessed of the right of property. This is undoubtedly the case in actions for the recovery of real estate which cannot pass but by deed, but cannot apply to the case of personal property, which may pass by delivery. The possession of *Harville* was not inconsistent with a subsequent legal possession in him; it did not necessarily destroy his title; on the contrary, his subsequent possession furnished (as to a mere chattel) a presumption of a sale which was to be left to the jury.

The second ground contains objections which apply more to force and effect than to the competency of the evidence. If I thought the irregularities such as to effect the sale and render it null and void, still I conceive it my duty, to submit to the jury the question, whether that which was called irregularity might not be a mere clerical mistake. And as it regards that which appears to be in the opinion of the counsel, the greatest irregularity, I entertain no doubt myself, that it is a mere clerical mistake; that

1908 is written for 1807, by which it appears, that the second execution issued after the third.

Mr. Justice *Bay* concurred with Mr. Justice *Colcock*.

Simons, for the motion.

Hunt, contra.



THE CITY COUNCIL vs. WILLIAM HAYWOOD.

On an indictment, where a witness is entitled to a part of the penalty, he is a competent witness, if he releases his interest.—(a.)

Where a witness has gone through his testimony and it is then discovered, that he is interested, he will be competent, if he release his interest; and he may be then re-examined.

Interest, which goes to the competency of a witness, is a question to be determined by the court, but *influence* which only affects the *credibility*, is a matter for the jury.

THIS was an action brought before the City Recorder, *John Bee Holmes*, Esq. in the city court, to recover a penalty incurred by a breach of one of the by-laws of the city.

The only witness called to establish the fact was *Mr. Levy*, the deputy marshal. After he was sworn and had given evidence, it was discovered, that he was entitled to half the penalty.

An objection was then made to his competency and sustained. He offered however to release his interest; but the Judge was of opinion, that it was too late after he had given evidence.

A verdict was found for the defendant, and a motion was made for a new trial, on the ground, that the Recorder was mistaken in the law, in refusing to permit the witness to release his interest, and then to give evidence to the jury.

Mr. Justice *Nott* delivered the opinion of the Court.

The rules of evidence appear to be reduced to some-

thing more like system, by modern decisions and better understood than formerly.

At one time an opinion prevailed, that it was too late to object to the competency of a witness, after he was sworn in chief: And it was not until the time of *Lord Mansfield*, that the line between that influence which shall only affect the credit of a witness, and interest which goes to his competency, was distinctly drawn. (*Walton vs. Shelly*, 1 T. R. 300.)

In the principal case the release would have entirely removed the interest of the witness. It is true, he would have been under the *influence* of his testimony previously given; but that was a question of *credibility* for the *jury*, and not of *competency*, for the *court* to determine.

It does not necessarily follow, that because a witness has an interest in the event of a cause, that he will not tell the truth. And the readiness with which the witness in this case offered to release his interest furnished pretty strong proof, that he had not acted under its influence. He was under no necessity either legal or moral to execute such a release. And it is not to be presumed, that a person would do a voluntary act which would reduce him to the necessity of committing perjury without some motive.

I am of opinion, that the testimony ought to have been received, and that a new trial therefore ought to be granted.

Justices *Bay*, *Colcock*, *Johnson*, *Huger*, and *Richardson*, concurred.

(a.)—*EDE VAN EVOUR, ads. THE STATE.*

An informer, unless saved by the statute, or from the necessity of the case, is not a competent witness.

The acts of 1784 and 1801, to prevent retailing without license, have always been regarded pari materia.

In this case the defendant was indicted at Charleston for retailing Spirituous Liquors, without a License.

The informer was ruled by the Circuit Court, to be a competent witness, and his evidence went to the Jury.

A verdict was had for the state, and a motion was now submitted for a new trial, on the ground that the informer being entitled to a moiety of the penalty, was not a competent witness.

Mr. Justice *Huger* delivered the opinion of the Court.

The acts of 1784, and 1801, (1 *Brev. Dig.* 418, *P. L.* 340, and 2 *Faust*, 401. 1 *Brev. Dig.* 82,) have always been regarded as *pari materia*. In the last, the penalty is only reduced. It does not interfere in any other respect with the rights of the informer; and of this opinion were all the Judges in the case of the *State vs. Luke Williams*, (1 *Nott & M' Cord*, 26,) although they differed on another point involved in that case.

An informer, unless saved by the statute, or from the necessity of the case, has always been held to be an incompetent witness. (*Rex vs. Tilley*, 1 *Strange*, 316, *Rex vs. Robotham*, 3d *Burrows*, 1473. 1 *Saunders*, 262. *Phillips on Evid.* 92.)

The motion is granted.

Nott & M' Cord, for the motion.

Stark, Solicitor, contra.

R.



HENRY MIDDLETON vs. MARY DUPUIS.

Five years actual adverse possession of a tract of land under a junior grant, will give the tenant a title to so much as he has in actual possession, even against a person who has a paramount title, and is in the *constructive* possession of the part in dispute.—(a.)

THIS was an action of Trespass to try title. Tried before Mr. Justice *Richardson*, at Coosawhatchie.

The plaintiff claimed under an old grant for 5635 acres; he established the identity of the land, and deduced a regular title from the grantee. He also proved a continued possession in *part*, of the premises from the year, 1783, down to the commencement of this action, which was brought in the year 1811.

The defendant claimed under a grant for 120 acres, dated in 1799. She established the lines of this tract, deduced a regular title from the grantee, and proved the exclusive actual possession of the whole from the date of the grant.

The Judge charged the Jury, that though the possession of a part by the plaintiff was *constructive* possession of the whole; yet, that the exclusive, actual possession of a different part by the defendant, would rebut the plaintiff's

constructive possession of so much as the defendant had held an exclusive, actual possession of.

The Jury found for the defendant.

The plaintiff moved for a new trial, on the ground of misdirection of the Judge, in stating that the continual possession of the plaintiff from the year, 1783, did not entitle him to recover against the defendant, the parcel of the same lands of which defendant had had actual possession for twelve years, prior to plaintiff's action.

Mr. Justice *Richardson* delivered the opinion of the Court.

The question is, whether a party having paramount title to a tract of land, and being in actual possession of a part, (and of course, in constructive possession of the whole,) can be deprived of any part of the land by reason of the adverse and exclusive actual possession of *that part*, by a mere occupant under a younger title.

The general rule is, that where two persons, one the freeholder, and the other a mere occupant, are in possession; that of the owner shall prevail in exclusion of the other; (*Salk*. 246. *Lilly*, 336,) or rather the joint possession enures to the sole benefit of the freeholder. But this is not the case when the owner is ousted, and exclusive possession in the occupant of a part, is proof of a disseisin of the freeholder; (*Plowden*, 235,) and such possession being long continued, is strong proof that it was adverse, and will operate to give a perfect title to the occupant. But though the question is important, I need not investigate the distinction farther, because it has been fully sanctioned. In the case of *John Singleton vs. Thomas Broadway*, 1810, at Columbia, it was taken and recognized by the Constitutional Court. *Broadway* had taken possession of a small part of *Singleton's* plantation upon which he was living. *Singleton* was ignorant of the trespass, from not knowing the boundaries of his land; *Broadway*, accordingly remained quiet some 10 or 12 years, when *Singleton*, who was all the time living upon the plan-

tation, sued him. But the Jury found for the defendant to the extent of his actual possession of *Singleton's* plantation; and the verdict was supported by a full bench of Judges. The distinction is therefore established, and the new trial of course refused, upon authority. In that case, my professional opinion was overruled. But I now fully concur in the decision. I deem it not only concurrent with the later adjudications under the statute of limitations, but in its true spirit. Whatever other objects may have been in view, I cannot from the situation of South-Carolina, in 1712, for a moment, doubt this intention; that the great *Landgrave*, who, for a series of years would not seek the boundaries of his territory, should, through the actual occupancy of another, lose his superfluous *terra incognita*. And the long and open possession of the defendant, under an honest title, makes the application to this case of the popular mode of statutory conveyancing, by possession, a happy and satisfactory one. The motion is refused.

Justices *Bay, Colcock, Nott* and *Johnson*, concurred.

Petigrew, for the motion.

Martin, contra.

(a.)—See *Grimke vs. Brandon*, 1 Nott & M'Cord 356-68. R.



THE STATE vs. WILLIAM HEYWARD.

Judgment will not be arrested upon objections not arising on the face of the record: Misdirection of the Judge can never be a ground.

Where a number of persons have associated together to commit an unlawful act, e. g. to commit a robbery, and one only perpetrates the act, all the company are guilty.

IN January Term, 1820, at Charleston, William Heyward, the prisoner, was tried on an indictment for robbery committed on the highway contrary to the act of assembly in such case made and provided. The clause in

the act of assembly is as follows: "And be it enacted by the authority aforesaid, that if any person or persons, shall steal or take by robbery any bond, warrant, bill, or promissory note, for the payment or securing the payment of any money, being the property of any other person or persons, or of any corporation, notwithstanding any of the said particulars, are termed in law a chose in action, it shall be deemed and construed to be felony of the same nature, and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been if the offender had stolen or taken by robbery, any other goods of like value with the money due on such bill, bond, warrant, or note, or secured thereby and remaining unsatisfied; and such offender shall suffer such punishment as he or she should or might have done, if he or she had stolen other goods of the like value, with the monies due on such bond, warrant, bill, or note, respectively, or secured thereby and remaining unsatisfied, any law to the contrary thereof in any wise notwithstanding." (2 Brev. Dig. 196. P. L. 147.

The offence charged in the indictment was, that one *John Peoples* had been robbed, on the highway, of certain bank notes, for the payment of money, and of specie.

The evidence of the prosecutor, *John Peoples*, was substantially as follows:—That on the 19th day of February, 1819, in travelling from Charleston homeward, with his waggon, he was violently assaulted at a well on the road side, near the Six Mile House, and there cruelly and inhumanly beaten by sundry persons who came out from the yard and house. That among those who were present was *Heyward*, the prisoner, who took an active part on the occasion, and struck the prosecutor with a stick upon the head; that he had done nothing to provoke such ill usage; that the persons, nine or ten in number, came in a hurried manner, advanced within ten steps of the waggon; that he took up his gun and ordered them to stand off;

they being armed, some with sticks, others having guns ; they stopt, but upon information being given to the prosecutor by a boy, travelling in company with him, that his gun was not primed, the assailants rushed forward, knocked the prosecutor down several times, beat him very much, punched him in the mouth with the muzzle of a gun, thereby cutting his lip nearly in two ; that he expected to be killed. They however went back to the house, and he with the assistance of the lad who was travelling in company with him, got into the waggon, which was driven off ; that he was immediately pursued by two men, and overtaken at the distance of two hundred yards. He identified those two to be *Fisher* and *Heyward*, the prisoner. The boy, who was driving, was ordered to stop the waggon, upon which, he put the horses into a trot, when *Fisher* galloped before and stopped the horses. He said *Heyward* then rode up and asked where was that rascal ? And being told by the boy, that he was in the waggon, *Heyward* ordered him to come out ; he declining to do so, *Heyward* swore, that unless he did he would shoot him ; that *Heyward* at the time had a pistol in his hand ; that the witness then got up to the side of the waggon, when *Fisher* who was on foot took him by the arm, pulled him out and carried him to the back part of the waggon. That *Heyward* asked him how much money he had, and being told not much, he was ordered by *Heyward* to give up what he had. He declining to do so, *Heyward* stooped down, put his hand into the pocket of witness, and took out his pocket book, opened it, and asked if that was all the money he had ? At the same time *Fisher* felt his pockets. The witness told them, that it was all the money he had. *Fisher* remounted his horse, and together with *Heyward*, rode up towards the house. The witness was asked if he was certain as to *Heyward's* person ; he replied, that he was positive, that it was *Heyward*, who put his hand into his pocket, and took out the pocket book, which the witness said, he parted with reluctantly, and expected to have been killed unless he gave it up. On proceeding up the

road as far as the Ten Mile Spring, he was advised by persons whom he there met with, to return to town, and obtain medical aid. He did so. This was on Friday, the day of the robbery. That on the Sunday following he went to the gaol; *Heyward* was there shown to him, and he immediately knew him to be the person who had robbed him, and he pointed him out as such. He, at the next court in Charleston, saw *Heyward* passing about, and he knew him to be the same, of which he said, he had then no doubt. He said he had lost by the robbery a twenty, a ten, and a five, dollar bill; all, as he testified, being South-Carolina money, and three or four dollars in silver. These, together with his pocket book, he had lost. He acknowledged, on being cross examined, that he had been mistaken in having testified, that he had seen *Roberts* in gaol. He thought, he had been told, that *Fisher* and *Heyward* had been taken on suspicion; and the object of his going to gaol was to ascertain, whether he would know them. He did not think, that *Fisher* and *Heyward* were talked of at the gaol, before they were brought down. When brought down, he knew them by their faces. On being asked he said, that, on leaving the well, he took the right hand road above the Six Mile House, and was in it when he was robbed. This road was fifty or one hundred yards from the main road, but was a waggon way which led through the field to avoid the sand. That he was in sight of the house when he was robbed. He had taken two or three drinks before he got to the well, but was sober.

Zachariah Carville, the lad who accompanied the prosecutor, *Peoples*, corroborated his testimony in all the material facts sworn to by him, and presented some additional evidence of enormity. He said that on *Fisher* and *Heyward's* riding up, the former ordered the driver to stop the horses; the order not being obeyed, *Fisher* rode up and struck him on the head with a stick. That *Heyward*, before this had snapped a pistol at him. He saw *Heyward* put his hand into the pocket of *Peoples*, and

take out his pocket book. That he also saw *Heyward* present and snap a pistol at *Peoples*. He said that the first time he saw *Heyward* after the robbery, was in a room in the court-house; that he knew him well, and said that he really is the man who took the pocket book, of which fact, he has no doubt.

In the defence, evidence was offered, intended to show, that *Heyward* could not have been one of the persons who was present when the robbery was committed. *Zilpha Miller*, who had been hired by *Heyward*, the proprietor, to keep the Six Mile House, for him, said that on the day of the robbery, and after the affray at the well, *Heyward* was engaged, personally, in replacing with her certain furniture which had been turned out of the house; that he was so immediately in her view, that he could not have been absent from her five minutes, nor three minutes; she was confident he could not have been absent five minutes. That he remained, after the affray at the well, about an hour and a half, thus engaged at the house; and that he then set out for town, accompanied by *Fisher* and wife, *Roberts* and *Laird*. She saw them proceed down the road in a direction for town. She testified as to the dress of *Heyward*, on that day, and her evidence went to show that he was not clad as the person committing the robbery, had been described by the witnesses of the state; and proved that *Laird*, who was at the Six Mile House that day, was so dressed.

Testimony was offered to impair the credibility of *Peoples*, the prosecutor, but Col. *Levy*, the witness, in the evidence he gave, rather established than weakened his credibility.

It was also proved, that on *Heyward's* being re-taken, *Laird* said that he must be off, and that on the next morning, he took his departure for Boston.

Joseph Roberts, one of the assailants at the well, a person implicated in this charge, who had been tried on this indictment and acquitted, *Laird*, having given testimony in his behalf, he testified, that this man *Laird*, was one of

the persons who committed the robbery. To this fact, he swore most positively, and solemnly asseverated that *Heyward* was not present at the robbery. On being asked how he knew it, he hesitated to answer, and from his manner, evidently designed to convey the idea, that he himself was the other person. He said that *Heyward* knew nothing of the robbery. That the witness had given no information of *Laird's* guilt till after his own acquittal; and that when the robbery was committed, *Heyward* was at the house.

Col. *Cleary*, who was called in reply on the part of the state, said that he accompanied *Peoples*, the prosecutor, to the gaol, and his testimony went to corroborate the facts sworn to by *Peoples*, which took place at the gaol.

The Jury found the defendant guilty.

The defendant appealed, and the causes of appeal contained in the brief, were :

1st. For a new trial on the ground, that the verdict was contrary to the weight of evidence—And

2d. In arrest of Judgment, on the ground of misdirection in point of law on the part of the Presiding Judge, in having directed the Jury to the following effect and purpose : That if they believed the prisoner to be one of a gang who had associated themselves together for the purpose of committing robberies generally, or in or near the Six Mile House, they had a right to presume him to be constructively present on the particular occasion set forth in the indictment.

Mr. Justice *Gantt* delivered the opinion of the Court.

The Court are of opinion, that there is no cause for arresting the judgment in this case. That can only be done upon objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous. No misdirection on the part of the Presiding Judge ; no defect in evidence, or any other circumstance attending the trial, dehors the record, is a ground for ar-

resting the judgment. (*See Chit. Crim. Law, tit. Arrest of Judgment.*)

The present motion therefore can be considered as one for a new trial only, for the several reasons taken in the brief: and first, is the prisoner entitled to a new trial for the supposed misdirection in the charge of the Presiding Judge? The correctness and propriety of the charge must be judged of by the nature of the offence contained in the indictment, and the manner of setting it forth, the evidence in support of it, and with reference to the arguments of counsel. In this indictment, sundry persons are included; various counts inserted, under which the persons implicated are respectively charged, first, as principals committing the robbery in person, and secondly, as aiders and abettors or principals in the second degree. After that manner, is *Heyward*, the prisoner, charged. From the evidence, no possible doubt can be entertained, but that a most unlawful, unprovoked, wanton and violent assault has been made on the prosecutor *Peoples*, by various persons coming out of the yard and Six Mile House, of whom *Heyward*, the prisoner, is positively sworn to have been one. The assault committed on a peaceable, unoffending stranger on the high way, travelling homewards from a market, in whose behalf, the arm of protection ought rather to have been raised by the proprietor of the house, than extended to his annoyance. The evidence shows that immediately consequent upon the outrages offered at the well, and when the prosecutor *Peoples*, had proceeded at most but 200 yards from the place where he had been so shamefully abused, he was followed, forced to stop, and robbed. These are strong circumstances, and if not leading to the direct conclusion, certainly bear along with them the probability, at least of a combination having been formed on the part of the assailants, to act in concert, upon some unlawful enterprize; and that they were encouraged to carry it on from the strength of their number, and the certainty of mutual assistance. It was so considered by the Attorney-General, who made it a strong ground of argument;

contending that the circumstance of the assault at the well, and what immediately afterwards took place, would justify the Jury in concluding that *Heyward*, the prisoner, was a principal in the second degree, in this robbery, although he might not have been actually present when it was committed. These were the considerations which led the Presiding Judge in his charge to draw the attention of the Jury to the doctrine of constructive presence, if they should have reason to distrust or discredit the positive testimony which went to establish beyond doubt, (if accredited) the personal agency of *Heyward* in the robbery.

The law read by the Presiding Judge, and from which his comments were made, was the following from *M'Nally*: "In some cases, there may be legal evidence of robbery, when in truth the defendant never had any of the losers goods in his possession, as when I am robbed by several of one gang, and one of them only takes my money, in which case in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they gave to one another through the hopes of mutual assistance in the enterprize, nay, though they miss of the first intended prize, and one of them ride from the rest and rob a third person in the highway, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing." (*M'Nal. Ev.* 596.) Now if the evidence in this case would justify the inference, that the assault at the well was but the prelude of an intended robbery; & there is great difficulty in putting any other interpretation upon it, then it is impossible to conceive law more immediately applicable to the case. Whether the intent to commit robbery existed at the time of the assault by those engaged in it or not, the act committed was nevertheless unlawful, tending to excite a just sense of danger on the part of *Peoples*, the prosecutor; and certainly paved the way to the more ready accomplishment of what immediately afterwards took place, the robbery. Now, as to the abstract principle contained in the brief, can there be a

doubt, that if an association should be formed by a gang of men, with the avowed design and understanding among them, to commit robberies generally, and they should assemble at a particular place to carry on their trade and occupation, the more conveniently, and especially on the side of the highway, that so long as this agreement continues; so long as they prosecute their design, they would respectively become principals in every act of robbery, which each might commit in the neighbourhood of their range, whether present or not? The contrary doctrine would lead to the most mischievous consequences; the law would identify them as one and the same in respect to robberies committed, and this from the countenance and encouragement which each affords the rest; the mutual assistance which they are ready to afford in every enterprise in which any of them may be engaged for the common benefit, in pursuance of their common interest.

In 1st *Chitty*, (*Crim. Law*, 257,) the law is thus laid down: "The presence need not be an actual standing within sight or hearing of the fact; but an active co-operation in the crime at the time of its commission; as where one stands to keep watch at a convenient distance, while another completes the felony. So if several persons come to a house with intent to make an affray, and one be killed, while the rest are engaged in riotous and illegal proceedings, though they are dispersed in different rooms, all will be principals in the murder." Here it is to be observed that no intent to commit murder existed on coming to the house; the intent was to make an affray, and this intent was common. One of the gang, however, commits murder, the rest, although absent in other rooms, prosecuting the object of their visit, not actually assistant in the murder, and not knowing that it was intended by the perpetrator, still they are considered as principals in the offence. The reason is, that they were engaged in the doing of an act which was unlawful, committing an affray, and shall be held equally answerable for all the consequences to which it may lead. Terror is inspired when numbers assemble themselves to-

gether for an unlawful purpose. Each actor is emboldened to go greater lengths by the countenance which the rest affords, and resistance is weakened, if not done away with altogether, by the certain danger arising from opposition. There is nothing which the law more abhors than illegal force and violence, and its just reprehension makes the authors answerable in particular cases for more than they may have actually intended to commit, but which has been the consequence of an incipient illegal act. *Chitty* is supported in his position by *1st Hale*, 439. *Haw. b. 2, C. 29, S. 8.* *1 East, P. C. 258.* *Dalton*, who is also referred to by *Chitty*, deduces a correctness in this doctrine from what is said in *2d Sam. 12, 9*, where *David* is told (from GOD,) that he had killed *Uriah*, whereas he only commanded *Joab* to kill him: And in the case of the *Serpent* who was aiding and advising the perpetration of the first sin; and who, by the judgment of the Almighty, had imposed upon him a greater punishment, than on the woman or man. The case of the *Lord Dacre*, noticed in *1st Hale* 439, although a case of murder, shows that the consequences, growing out of an unlawful act, devolve upon all who have been engaged in it. In that case, the intent was to steel deer in the park of one *Nelham, Rayden*, one of the company, killed the keeper in the park. The *Lord Dacre*, and the rest of the company being in other parts of the park, it was ruled that it was murder in them all, and they died for it.

In the case before the court, although there was no express evidence of any association having been formed by the persons engaged in the affray at the well, and therefore by a remote possibility, the principal said to have been advanced, may have had an influence in the finding of the Jury. Yet it is thought much more probable, that if the Jury were influenced by any thing short of the positive testimony of the prisoner being the robber, it must have been a conviction resting on their minds and growing out of the circumstances of the case, that the robbery was the result of a preconcerted determination to commit

it. The evidence affording this conviction being the violence of the assault at the well, a violence calculated, and perhaps intended, to impress upon the mind of the unhappy victim of it, so strong a sense of their barbarity and his own danger, as to induce him afterwards to yield his property without resistance, rather than forfeit his life by a refusal. The time when the robbery was committed and the place where, are no inconsiderable circumstances to strengthen the conclusion, that the last act was no more than the consummation of what had been before determined on.

An argument has been offered to show, that, as the place where the robbery was committed, was off the highway, that the prisoner is entitled to his clergy. But the court cannot view the circumstance in that light. It was a way used in common by travellers, to avoid the sand, and must therefore be considered as much a highway as the road which he left, so long as there was no restriction to the enjoyment of this privilege. A practice not confined to that particular place, but one which extends throughout most of the low country, where the roads are deep with sand.

The evidence being positive as to the prisoner's being one of the persons who committed the robbery, it appears from short notes taken by the Judge of his charge, that the Jury were told that the question was one of identity of person, in the solution of which they were to be governed by the evidence which had been offered.

From the most attentive view of the evidence and circumstances incident to this trial, the court are of opinion, that no new trial can be granted, and that the motion, for the same, must fail.

Justices *Nott*, *Johnson*, *Huger*, and *Bay*, concurred.

Mr. Justice *Richardson*:

I dissent in this case from the opinion of the court, upon the alleged ground of mistake in law, in the charge of the Judge to the Jury.

Mr. Justice *Colcock* was absent, holding the court below.

MICHAEL DEGNAN *ads.* HENRY WHEELER & Co. *et al.*

Where a writ of foreign attachment has issued against a defendant, who, at the time, was within the state, the court will on motion at the first term after the return of the writ quash it, although it appear, that there was great reason to suspect, that the defendant had gone abroad, and that suspicion arising from defendants' own conduct.

TRIED before Mr. Justice *Colcock*, at Charleston, May Term, 1819.

In this case a writ of foreign attachment had been issued against the defendant, on the 19th May, 1819, under the act of assembly, which authorizes such a proceeding against the property of a debtor residing or being without the limits of the state.

A motion was made to quash this writ for irregularities on the 26th May, on the ground, that the defendant never had been absent without the limits of this state. Affidavits were submitted to that effect. The Presiding Judge refused the motion.

A motion is now made to set aside that decision and to quash the writ, on the ground before stated; viz. that the evidence was abundant, conclusive, and uncontradicted, that the defendant was within the limits of the state at the time the writ was issued.

Mr. Justice *Richardson* delivered the opinion of the Court.

There was some testimony to show, that the plaintiff was well warranted in the suspicion, that the defendant had left the state; and the defendant appears to have purposely created that suspicion by setting forth in a newspaper, that he would shortly go abroad. But it was very clear that he had not gone, when the writ was lodged, and the attachment levied: So that the true question is, can a writ of foreign attachment be quashed, because, in fact, the defendant was within the state at the time when the writ was issued and served, upon that fact appearing at the first term after the service, notwithstanding there was

great reason to suspect he had gone abroad ; and that suspicion arising too from his own conduct.

The question is one of strict law : The remedy by attachment in this respect is unknown to the common law, though it is found in the customs of London ; and we must therefore look exclusively to the legislative provision made upon the subject. The act of 1744, which introduced the writ of foreign attachment, enacts (1 *Brev. Dig.* 33. *P. L.* 187,) "that any person, &c. having occasion to commence any suit, &c. against a person residing or being without the limits of this province, &c. may, &c." (pointing out the mode of proceeding by attachment.) The act of 1759, (*P. L.* 252, 1 *Brev. Dig.* 37,) gives the same remedy against persons who conceal themselves so that process cannot be served upon them, "for the space of three months." But concealment, for that space of time, is not charged in the case before us. We must then look to the former act ; and here we find the words explicit ; to wit, "against any person residing or being without the limits of this province." The rule is established, that where a new remedy is introduced by statute it must be strictly pursued ; and if certain causes are required as a condition precedent, unless these existed, the remedy does not follow. If this rule be disregarded, the distinctions and exceptions would be endless and arbitrary. Here too the act of 1759, makes one specific exception, i. e., against persons who conceal themselves for the space of three months. This particular exception shows further how literally the former act is to be construed, i. e. without any other exception. When we consider too, that this writ may be taken out, at the will of any person in any district, upon giving his own bond merely, (*Act of* 1799. 2 *Faust* 315. 1 *Brev. Dig.* 41,) it will be seen, that unless the act be strictly pursued, manifest inconvenience and even great oppression might follow without the possible punishment of a pretended but beggarly creditor, or probable recompense to the supposed debtor. But in cases of domestic attachment, as authorized by the act of

1785, (*P. L.* 367, 1 *Erev. Dig.* 40,) wherein according to a late decision, *Grisham vs. Deule*, (*ante* 130,) this court will not receive evidence to contradict the charge, that the debtor is going off privately or removing his effects, that act cautiously requires the writ to be issued by an officer, and only upon the oath of the creditor; and after he has given bond with good security in double the amount of the debt claimed, to answer all damages to the defendant. This decision was predicated upon the expression of the act of 1785, which directs the writ to be issued upon oath made and bond given with security, which affords a provision both for the punishment of a pretended creditor, and good security, to answer any damages which may arise to the defendant, from illegal conduct.

Take the two remedies by foreign as well as domestic attachment, and they form an ample system, but clearly distinguishable from each other, and to be used under different circumstances. Perhaps it is to be regretted, that the same precautions by affidavit, bond, and security, are not required to be observed, in cases of foreign, as in those of domestic, attachments, and the two modes of proceeding blended in one writ; but the law is otherwise. The motion is granted.

Justices *Huger* and *Nott* concurred.

Mr. Justice *Colcock* dissented:

In determining this question, it is not only necessary to advert to the language of the act, but to the object and intent of it. Its preamble states, that "whereas many inconveniences and injuries have frequently happened in the defect of the recovery of debts where the debtor is absent or willingly absconds or withdraws himself out of the limits and jurisdiction of this province, having property therein;" "for remedy and prevention of which," &c. "Be it enacted, that from and after the passing this act, any person whatsoever having occasion to commence any suit or action in the Court of Common Pleas, against any person whatsoever, residing or being without the limits of this

province, shall, by himself or his attorney, petition the Chief Justice, state his demand, and that the debtor is absent from and out of the limits of this province, and procure an attachment against his goods," &c. It being found inconvenient to apply to a Judge for an attachment, the law in this particular has been altered, and the clerks of the court are authorized to issue them upon the applicants giving bond in double the amount of the sum sued for, conditioned to pay any damages which may result from illegally obtaining the attachment. Having granted this remedy, it seems to have been an object with the legislature to secure its citizens against its abuse. For this purpose, they were required to go before the Chief Justice, or some other Judge, set forth their demand, (in other words show that they had a demand) and state that the debtor was absent from the state, upon which the writ issued. The act speaks of two classes of debtors, those residing out of the state, and those absconding from, and leaving the state; as to the first, something like absolute certainty could be obtained as to their being within the state, but as to the latter, it is morally impossible in many instances until it would be too late to derive any benefit from this process. The first attachment has priority; hence, when a man in trade absconds, all being anxious to secure their demands, resort to this remedy. In this state of things, would it not be a mockery in the law to say to a creditor, you shall have your remedy the moment your debtor crosses the line, but if you are one moment too soon, the process shall not avail you? How is he to ascertain it? I say then, that all which the law can require, is a reasonable probability.

Again, I have said we must advert to the object of the law to explain its language. Now the express object of this act is to make the defendant a party in court; if he put in bail within a year and a day, the attachment is dissolved and the goods restored. If he appear within two years and disprove the debt, he shall recover damages against the attaching creditor. With all these guards

upon his rights and the bond now required, I ask if a defendant should be permitted to come in and dissolve an attachment which has been issued upon his own declaration, that he was without the state.

In this case, a number of affidavits were read; time does not permit me to do more than briefly state the substance of them. There was also produced, an advertisement, in which the defendant gave notice that he meant to leave the state for some time, which was dated — May, 1819; and that his wife would transact his business during his absence. The affidavits showed, that on the 17th May, the defendant disappeared; that he was seen by one under such circumstances as to excite suspicion, and cause an explanation, when he acknowledged that he owed some debts and wished to avoid the court. That he enquired of another the way out of town, and made the same acknowledgment to him; that on the 18th and 19th, application was made at his store to his wife, and the person supposed to be his brother, for the payment of debts, and an enquiry made where the defendant was, to which they both replied at different times, that he was gone to the northward, to New-York, and refused payment. After the attachments issue, the defendant appears, makes an affidavit that he was near the city at a Mr. Livingston's on the day on which the attachments issue, and he, Livingston, swears to the same fact. Upon the facts, there can be but one opinion; that the defendant intending to deceive and defraud his creditors, induced them to believe that he was gone to the northward, while he lay secreted in the vicinity of the town. I say secreted, for it is clear that his creditors were active in searching for him in the suburbs of the town. Is he then to be permitted to take advantage of this conduct to the injury of just claimants, and that too when no possible injury can result to him? There were domestic attachments issued two or three days after the foreign, when perhaps his other creditors had heard something of him, so that the probability is that these first attaching creditors will not only lose their lien, but lose their debts.

But I consider this point determined by the case of *Grisham vs. Deale*, (*ante* 130,) lately decided at Columbia. That was a case of domestic attachment. The plaintiff swore, that the defendant was about to abscond, entered into bond and obtained his attachment. The defendant offered affidavits to show, that he did not intend to remove, with a view to quash the attachment. This motion was rejected. The court said, he, the plaintiff, may have believed it; if he has been guilty of perjury, let him be indicted or sued on his bond. And for myself, I add, that in that case as well as in this, I was influenced by the consideration, that the party, plaintiff, having complied with all the requisites of the law, (in good conscience and solely with a view to obtain a process by which to bring the party into court as far as we could know,) and having obtained the writ, it cannot be quashed upon the ground, that the plaintiff was mistaken.

I am aware, that it may be answered, that here a fact is to be proved, in that case it was a matter of opinion, but it at last resolves itself into this, not whether the fact existed, but whether the plaintiff conscientiously believed it.

Justices *Bay* and *Johnson* concurred with Mr. Justice *Colcock*.

N. B.—The court were equally divided, but as the case was tried on the circuit by Mr. Justice *Colcock*, Mr. Justice *Richardson's* is the opinion of the court.



JOHN NEHBE vs. THOMAS W. PRICE, Administrator P.
S. SMITH.

An estate is not bound by the contracts of an administrator.

In an action against an administrator, an order drawn by the plaintiff in favour of a third, on the intestate, found among the intestates papers, and not rebutted by other evidence, is good as a discount, and will entitle the defendant to a deduction *pro tanto*.

THIS was an action of assumpsit, on a Blacksmith's account, amounting to \$438 43.

To this, non-assumpsit and a discount amounting to \$372 5, were pleaded.

The plaintiff proved his account.

The defendant then produced several orders drawn by the intestate on his factor, in favor of the plaintiff, on which were receipts signed by him. The defendant also produced an order drawn upon the intestate by the plaintiff in favour of *A. Gray*, or bearer, for \$130; this order was found among the papers of the intestate. The defendant also proved that the two items in the plaintiff's account were for work done subsequent to the death of the intestate.

The Jury found a verdict for plaintiff.

It appeared that the items charged for work done subsequent to the death of the intestate, were allowed, and it further appeared that the defendant was not allowed a credit for the draft of \$130.

A motion was now made for a new trial, on the ground that the verdict was contrary to law and evidence.

Mr. Justice *Huger* delivered the opinion of the Court.

It has been repeatedly decided in this Court, that an estate is not bound by the contracts of an administrator; so much therefore of the account as occurred subsequent to the death of the intestate, ought to have been omitted.

The order drawn by the plaintiff on the intestate in favor of *A. Gray*, or bearer, and found among the papers of the intestate, not being rebutted by other evidence, was sufficient to entitle the defendant to a deduction *pro tanto*.

I am of opinion therefore, that on both grounds, the appellant is entitled to a new trial.

Justices *Richardson*, *Nott* and *Johnson*, concurred.

Mr. Justice *Colcock*, dissented.

Mr. Justice *Gantt*, was absent nearly this whole term, holding the Circuit Court.



CONSTITUTIONAL COURT

OF

South-Carolina, May Term, 1820—Columbia,

JUSTICES PRESENT THIS TERM.

CHARLES J. COLCOCK,	DAVID JOHNSON,
ABRAHAM NOTT,	JOHN S. RICHARDSON,
RICHARD GANTT,	DANIEL E. HUGER,

THE STATE vs. JOHN RAWLS.

Where a person, who is a witness to a particular transaction, has made a memorandum at the time of certain facts for the purpose of perpetuating the memory of them, and can at any subsequent period swear that he had made the entry at the time for that purpose, and that he knows from that memorandum, that the facts did exist, it will be good evidence, although the witness does not retain a distinct recollection of the facts themselves.

Where on an indictment for gaming, the prosecutor was unable to testify to particular facts except from seeing them in an affidavit made by himself, at the time that he had seen the offence committed, the evidence was held admissible.

Where, the prosecutor acknowledged, that he did not know the defendant, but that two persons with whom he was gaming, called him by a particular name to which he answered, and he pleads to the indictment by that name, and is found guilty, the court will not grant a new trial on the ground, that he has not been sufficiently identified.

The rules of Evidence are the same in criminal, as in civil cases.

THIS was an indictment for gaming, tried before Mr. Justice Nott, at Columbia, Spring Term, 1820.

Mr. *Eli Kennerly* was the only witness called on the part of the prosecution. He began by stating the circumstances *as they appeared*, by a certain affidavit drawn up by himself, at the time, and which he held in his hand.

He was asked by the defendant's counsel, whether he had a distinct recollection then of the facts contained in that paper, or whether he could only swear to them because he saw them there stated. He said, that some of them he recollected, but that of others he had no recollection; but that he knew he had put down at the time what he saw, and nothing more, and he was therefore able to swear, that all those facts actually existed at the time, although he had not now a distinct recollection of them.

It was then contended, that to such facts of which he had no recollection, except that he found them stated in his written memorandum, his testimony ought not to be received.

The court laid down the law to be, that where a person who was a witness to a particular transaction, had made a memorandum at the time of certain facts, for the purpose of perpetuating the memory of them, and could at any subsequent period swear, that he had made the entry at the time, for that purpose, and that he knew from that memorandum, that the facts did exist, it would be good evidence, although he might not retain a distinct recollection of the facts themselves.

The witness then proceeded to swear, that he saw the defendant with several others playing at cards. He said he recollected seeing one of Mr. Rawls' sons there; he did not know that it was the one now present. He did not know at the time what his name was, but persons with whom he was at play, told him his name was John. He said there were persons in the room who were not at play. He did not now recollect distinctly, that this defendant was playing, though he was under the impression that he was, but that he could not swear to it now, except from seeing it stated in his affidavit, and he knew, that he did not put down any thing which he did not see.

The Jury found the defendant guilty, and this was a motion for a new trial, on the grounds:

1st.—Misdirection of the court, on the point of law above mentioned.

2d.—Because the evidence was not sufficient to authorize a conviction.

Mr. Justice *Nott* delivered the opinion of the Court.

With regard to the competency of the testimony given on the trial, I still remain satisfied with the opinion expressed in the court below. The propriety of the rule as there laid down may be inferred from its necessity. And the occurrences of every day furnish abundant proof that the ordinary transactions of life could not be carried on upon any other principle. The subscribing witnesses to deeds can seldom prove their execution, except by barely recognizing their own signatures accompanied with the further fact, that they never do attest any writing which they have not seen executed. There are but few instances where they retain a distinct recollection of the fact of execution. The same may be said of the proof of merchants' books. It seldom happens, that the person making the entry can recollect the delivery of the articles.

It has been contended however, that the principle can only apply to transactions performed by the witness himself, as when an account has been settled by a clerk or agent and a balance struck, there he might be permitted to prove the fact by his memorandum or entry. But a moment's reflection must satisfy us that, that would be too restricted an application of the rule. In cases of tender of the payment of money, when it becomes necessary to prove some evidence of the time the transaction took place, the sum tendered or paid, the manner of performance, whether conditional or absolute, whether the payment was made on a bond, note, or open account, and a number of other facts, such evidence must necessarily be admitted.

It is further contended, that if such is the rule of law in civil actions, it ought not to be extended to criminal cases; but I believe it is now very well settled, that the rules of evidence are the same in criminal, as in civil, cases. (*Attorney General vs. Le Merchant*, 2 D. & E. 201, in note.) And in this respect, I can see no reason for a distinction.

Suppose a person should be accused of passing a counterfeit bank bill, or forging an instrument of writing, might not a memorandum of the date, the No. and amount of the bill, the bank from whence it purported to be issued, the names of the signers or the person to whom it was payable, and other evidences or emblems of identity, supported by the oath of the party who made it, be received in evidence, although without it he could not recollect one of those facts? I apprehend the question cannot admit of doubt. If such testimony is not competent, the practice of our courts has been uniformly wrong since ever I have been conversant with it; and a contrary practice would be the introduction of a new era in the administration of justice in this country.

It is true, that *Phillipps*, in his *Treatise on Evidence*, (209,) says, that "a witness, to assist his memory, may use a written entry or memorandum or the copy of a memorandum, and if afterwards he can swear positively to the truth of the facts there stated, such evidence will be sufficient. Yet if he cannot, from recollection speak to the fact any farther than as finding it stated in a written entry, his testimony will amount to nothing." But by a reference to the cases quoted by *Phillipps*, it will be found that the rule as laid down by him, applies only to copies of entries, and not to the original. The principal cases relied on, are *Doe vs. Perkins*, (3 D. & E. 752,) and *Tanner vs. Taylor*, a manuscript report of which Mr. Justice Buller, read in that case. The case of *Tanner vs. Taylor*, was an action for goods sold; the witness who proved the delivery, took it from an account which he had in his hand, being a copy as he said, of the Day Book, which he had left at home. It being objected, that the original ought to be produced, Mr. Baron Legge said if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make use of it. But if he could not, from recollection swear to the delivery any farther than finding them entered in his books, than the original should have been produced. The case

of *Doe vs. Perkins*, is more directly in point. The question was, at what time of the year the annual leases of several tenants expired. One *Aldridge* went round with the receiver of the rents, and minuted down their declarations respecting the times when they severally became tenants. When *Aldridge* was examined, the original book was not in Court; but he spoke of the dates of the several tenancies from extracts made by himself out of that book; confessing upon his cross examination that he had no memory of his own of those specific facts; but that the evidence he was giving as to those facts, was founded altogether upon the extracts which he had made from the above mentioned book. This evidence was objected to on the ground, that as the witness did not pretend to speak to facts from his own recollection, he ought not to be permitted to give evidence from any extracts, but that the original book ought to be produced. The Presiding Judge, however, admitted the evidence and the plaintiff had a verdict. On a motion for a new trial, Lord *Kenyon*, after adverting to the case of *Tanner vs. Taylor*, above mentioned, said that the rule appeared to have been clearly settled, and that every days practice agreed with it. And that comparing the case with the general rule, the Court were clearly of opinion, that *Aldridge*, the witness, ought not to have been permitted to speak to facts from the extracts which he made use of at that trial. And a new trial was granted. The same doctrine is laid down in *Peake's Evidence* (190.) If these authorities are to be relied on, I think the rule as laid down in the Court below, is very well established. Indeed, it is the only method by which births, marriages and deaths, and many other important facts of frequent occurrence, can, in most instances be proved. And the same rule has, in several late decisions been recognized by the decisions of this Court. In the case of *Pearson et al. vs. Wightman*, it was said that a witness who swore positively, from written memoranda, though they did not recall to his memory a recollection of the facts, was admissible, and that such

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testimony was better evidence than an adventurous and unaided recollection. (1 *Con. Rep.* 344.) The same principle was again laid down in the case of the *Corporation of Columbia, vs. Harrison.* (2 *Do.* 215.)

The next question is, whether the evidence was sufficient to authorize a conviction. The grounds on which the verdict of the Jury is attempted to be impeached, are, first, that the defendant was not sufficiently identified. Secondly, that the offence was not sufficiently proved. With regard to the first, the witness said he did not know the defendant. But two of the parties, who were playing mentioned his name, and he did not deny it. He has pleaded to the indictment by that name; and the Jury have been satisfied with the testimony: With regard to the second, the evidence is less equivocal. The witness went into the room as he says, to be satisfied of the fact. He there saw this defendant, or a person he supposes to be the same, together with several others, playing cards. Some of them acknowledged the fact, and mentioned the game that they were playing. I am therefore satisfied with the verdict, and the motion must be refused.

Justices *Colcock, Johnson* and *Huger*, concurred.

Justices *Gantt* and *Richardson* dissented.

Gregg, for the motion.

Stark, Solicitor, contra.

ALEXANDER B. STARK, *ads.* The BOARD of PUBLIC WORKS.

When one judge has made an order, the operation of which is defeated by subsequent circumstances, a succeeding Judge may make such further order as is necessary to carry the first into execution.

Where commissioners have been appointed by a Judge under the act of 1819, to assess damages done by the Board of Public Works to a citizen, and one or more of the Commissioners is unable or refuses to act, a succeeding Judge can appoint other Commissioners.

MOTION to reverse an order made by Mr. Justice *Nott*, Spring Term, 1820, at Columbia.

The act of assembly, of 1819, requires the Court of Common Pleas or Equity, upon application to them made, to appoint five appraisers, to value any lands which may be required by the Board of Public Works, for canals, &c. when they and the owners of the soil cannot agree.

At the fall court of 1819, five persons were appointed upon the application of the then engineer to appraise certain lands belonging to Mr. *Alexander B. Stark*, which were wanted for the purpose of cutting a canal. Since that time, one of the persons so appointed, had become interested in the question, and other causes rendered it necessary that some of the persons so appointed, should be changed the next term.—Application was made to the Court for that purpose, and upon hearing the motion, the Court ordered three others to be substituted in the place of three before appointed.

This was a motion to reverse that order, on the ground, that a succeeding Judge could not vacate or repeal an order made by his predecessor.

Mr. Justice *Nott* delivered the opinion of the Court.

The question, whether one Judge can reverse the order or decision of another, does not occur in this case. But the question is, whether, when one Judge has made an order, the operation of which has been defeated by any subsequent circumstances, a succeeding Judge can make

such further order as is necessary to carry the first into effect? The legislature has given the Courts of Common Pleas and Equity, the power, or rather has enjoined upon them the duty of appointing appraisers to value the property of individuals, which may be necessary for public purposes in aid of the internal improvements now carrying on by the state. Will it be pretended that if any one or more of them should resign, refuse to act, become interested in the question, or from any other cause could not serve, that others might not be appointed in their places? Such a construction would fall very short of fulfilling the expectations of the legislature. Indeed, it would be very unfortunate for the person whose property is taken, if it were so. It would not prevent the Public Works from going on, but it would leave the individual without the means of obtaining compensation. There are a variety of other questions interwoven in this motion, which the Court do not think regularly before them, and which it is not within their province to decide in this way. The motion must therefore be discharged.

Justices *Colcock, Gantt, Johnson, Richardson and Huger*, concurred.



EDWARD BROUGHTON vs. JOHN SINGLETON.

Hunting on uninclosed lands is not such a trespass as will support an action of trespass *quare clausum fregit*; nor will the owner's forbidding it, vary the case.

TRIED before Mr. Justice *Colcock*, at Sumter, Spring Term, 1820.

This was an action of trespass, *quare clausum fregit*, in which the Jury found for the plaintiff, \$300 damages.

The circumstances were substantially these: The defendant, and several others, were out on a hunting party, and rode into an old uncultivated field, around which there had been a fence, but which was then down in many

places. The plaintiff came up, while they were in the field, and ordered them off. The defendant replied that he did not know the field belonged to him, and that they would go out, and did so accordingly. While they were yet in the field, and before they could get out, the plaintiff seized the gun of one of the party, (Mr. *Moore*,) and in the end, took it from him, but the witness did not know what led to it, as they were scuffling for it when he first saw them, and while they were engaged, the defendant cried out to some one to "shoot the plaintiff." The plaintiff then fled, as the witness said, in a great fright, and one of them pursued him a short distance. The plaintiff had before forbade the defendant to hunt on his land, but he had very recently purchased this place, and it was proved as clearly as negative evidence could make it, that all of the party were ignorant that he then owned it. Several others were joined with the defendant in this action, and the Circuit Court sustained a motion for a nonsuit, as to them when the plaintiff had closed his evidence, but refused it as to the defendant, on the ground, that he had been forbidden by the plaintiff, to hunt on the land, and it was left to the Jury to decide, whether he knew the land was his or not.

The defendant now renewed his motion for a nonsuit, on the ground, that the hunting was on the uninclosed grounds of the plaintiff, and by law he was authorized to hunt there, and the plaintiff's forbidding him, did not take that right away.

If this motion failed, he also moved for a new trial :

1st. Because there was full proof, that the defendant was ignorant that the lands belonged to plaintiff. The trespass, if any, was therefore involuntary, and no injury was actually sustained.

2d. Because the verdict is excessive; and the result of the prejudices of the Jury.

Mr. Justice *Johnson* delivered the opinion of the Court.

Our ideas of those injuries, for which the action of trespass will lie, are principally derived from English authorities, and I am disposed to think they are followed without a proper regard to the vast difference between the situation of the two countries, so that in pursuing the letter, we lose sight of the principle. There, almost every foot of soil is appropriated to some specific purpose—here, much the greater part consists in uninclosed and uncultivated forest, and a part in exhausted old fields, which have been abandoned, as unfit for further cultivation, in which the cattle of the citizens feed at will. There, it is as practicable as necessary to protect the occupant against those petty trespasses—here, it is wholly impracticable, and I think unnecessary. The attempt to give this protection to uninclosed land, would overwhelm us in a sea of petty litigation, destructive of the interests and peace of the community. Upon this principle, it was determined in the case of *M Connico vs. Singleton*, (2 *Con. Rep.* 244,) that hunting on inclosed lands, was not such a trespass as would sustain an action; and upon the same principle, I was inclined to think that the motion for a nonsuit ought to have been sustained, but my brethren have thought it better that the case should be sent back for a new trial.

On the merits of the case, I am equally satisfied, that injustice has been done the defendant. The field in which the trespass was committed, if not wholly abandoned, was so exposed, and the dilapidated state of the fencing was such as to justify the belief that it was. And if he had a right to enter it, the defendants' forbidding him could not take it away; but all the injury complained of was the mere riding on the soil, and from the evidence, it appears he was ignorant, that it belonged to the plaintiff. If it be an injury, the damages given must strike every one at once as enormous and excessive. It is said however, that the personal insult offered to the plaintiff is a justification for this verdict. If one man wantonly entered on the lands of another for the purpose of insulting him, I would make it the means of punishing him, although he had not

left his track on the soil. But in this case any insult which the plaintiff received was the consequence of his own indiscretion, and he ought not now to profit by it. The motion for a new trial is therefore granted.

Justices *Nott* and *Huger* concurred.

Justices *Colcock* and *Gantt* dissented.



JOSEPH SUMMERS vs. WILLIAM CALDWELL.

A. moved for a rule on the sheriff to show cause why he should not be ordered to pay over to him money which he had collected for him on execution: The sheriff showed for cause, that he had levied an execution which he had in his hands against A. on the money and had paid it over to the plaintiff in that execution: Rule discharged.

Where the sheriff has collected money on execution for a plaintiff, the court can order it to be paid over on an execution in the sheriff's hands against the plaintiff.—(a.)

Money may be taken in execution *ut semble*.—(b.)

TRIED before Mr. Justice *Nott*, at Newberry, Spring Term, 1820.

This was a rule upon the sheriff calling on him to show cause why he should not be ordered to pay over to the plaintiff, money which he had collected for him on an execution against Isaac Seymore and Lewis Disher.

The sheriff showed for cause, that he had levied an execution which he had in his hands against Somers, on the money, and had paid it over to the plaintiff in that execution. The Presiding Judge therefore ordered the rule to be discharged, and this was a motion to reverse that decision.

Mr. Justice *Nott* delivered the opinion of the Court.

The old notion, that money could not be taken in execution because it could not be sold, seems not to be supported by modern adjudications. Indeed I doubt whether it was ever considered as law, though there appear to be some opinions favoring such an idea. *Dalton* says "This

writ of *fieri facias* is only against the goods and chattels of a man, viz. leases for years, corn growing or sown upon the ground or moveable goods, as cattle, corn in the barn, household stuff, money, plate, apparel, &c. (*Dalton's Sheriff*, 145.) But it seems to be doubtful whether the money so collected can be considered as belonging to the plaintiff until actually paid into his hands. (*Turner vs. Fendall*, 1 *Cranch* 117.) He nevertheless has an interest in it, of which the court can take notice, and order it to be paid over to an execution against him. (*Armistead vs. Philpot*, 1 *Doug.* 230.) And although it does not appertain to the office of sheriff to judge of the disposition of money which he has collected; yet the granting of an attachment is in a great measure discretionary with the court, and will not be ordered against an officer who has been guilty of no contempt or wilful disobedience of the order or process of the court; and particularly against one who has only done what the court itself would have ordered to be done, although it did not belong to him to judge of the matter. If any other person than the plaintiff had interposed a claim, the sheriff might have been ordered to pay the money into the court as by the execution he is directed. But it is not alleged, that it had been paid to a person not entitled to receive it. Discharging the rule however, determines nothing with regard to the rights of the parties, the sheriff has paid it at his own risk; and if he has paid it wrongfully, is responsible to the person aggrieved.

The motion to set aside the judgment is not regularly before the court, and therefore will not be regarded. The motion to reverse the decision of the court below is refused.

Justices *Colcock*, *Johnson*, *Gantt*, and *Richardson*, concurred.

Mr. Justice *Huger* absent.

(a.)—See also *Ball vs. Ryers*, 3 *Caines' Rep.* 84. The case of *Armistead vs. Philpot*, 1 *Doug.* 230, seems to be overruled by *Knight vs. Criddle*, 9 *East* 48, and *Willows vs. Ball*, 2 *N. R.* 376.

(b.)—It would appear, that the question, whether money could be levied on under a Fi. Fa. must have been one of frequent occurrence, yet it is surprising how few authorities are to be found on the subject in either the English or American books.

In the case of *Knight vs. Criddle*, (9 East 48,) Lord Ellenborough expresses his opinion clearly, that money (and bank notes) cannot be taken in execution, (although that was not precisely the question in that case) and this appears to be strengthened by the cases of *Fieldhouse vs. Croft*, (4 East 510,) and *Willows vs. Ball*, (2 Bos. & Pull. N. R. 376.)

The point is raised in the argument, in the case of *Price vs. Crump et al.* but is not noticed in the decision of the court: This case was an appeal from the chancellor, and Mr. Wickham, in his argument, says, "The only question is, can the sheriff levy a *feri facias* delivered to him to be executed upon money in his hands belonging to the debtor? or rather, must he not return the execution *ready to satisfy*?" The chancellor has admitted the proposition:" (2 Henn. & Mun. 91,) but this rests only on the statement of counsel.

In New York, in the case of *Hardy vs. Dobbin*, (12 John. 220,) they have decided, that, not only money but bank bills may be taken in execution. Mr. Justice *Spencer*, who delivered the opinion of the Court, says, (observing on the case of *Turner vs. Fendall*, 1 Cranch 133,) "In that case all the cases on the point were reviewed, and it was held, that money could be levied on. We now fully concur in the doctrine there advanced; we perceive no objection in principle, why money should not be taken in execution. It is the goods and chattels of the party; and it appears to us to comport with good policy as well as justice, to subject every thing of a tangible nature, excepting such things as the humanity of the law preserves to the debtor, and mere choses in action, to the satisfaction of the debtor's debts." And in a note to the case of *Ball vs. Ryers*, (3 Caines' Rep. 84,) the reporter states, that, "in the principal case, Mr. Justice *Livingston* said he had no doubt, money might be levied on." See also *Williams vs. Rodgers*, (5 Johnson's Rep. 167.)

R.



JOHN BAILEY *et al.* vs. JOSEPH IRBY *et al.*

In an action of trespass to try title, the occasional cutting of timber and the exercise of such other acts of ownership over it, as men are accustomed to do over *woodland*, is not such a possession as will divest the owner of his right to the soil under the statute of limitations.

The possession that will give a title under the statute of limitations, must be an actual occupancy a *pedis possessio* definite, positive and notorious.—(a.)

TRIED before Mr. Justice *Johnson*, at Laurens, Spring Term, 1820.

This was an action of trespass to try the title to a tract of land.

The plaintiffs claimed as the heirs at law, to William Riley, the younger, who died in 1795, inherited from Wm. Riley, the elder, to whom it was granted in 1771.

The defendants claimed a part of the disputed land under a grant to Thomas Word, in 1785, and a part under a grant to Robert Hutchison, dated in 1786.

The plaintiffs were infants at the time of the descent cast on the death of Wm. Riley, the younger, in 1795, and a continued minority from that time to the commencement of the action, prevented the statute of limitations from attaching subsequently, and the grants under which the defendants claimed, being subsequent to that under which the plaintiffs claimed, the case turned upon the possession of the defendants, prior to 1795.

A possession of more than five years of a small field, consisting of a few acres on that part of the land granted to Thomas Word, was proved in him, from whom the defendants deduced their title, before 1795.

The grant to *Hutchison*, covered lands without, as well as within the plaintiffs, and it was proved that *Hutchison*, from whom the defendants also derived title, settled within his grant, but without the plaintiff's lines, more than five years before 1795, and cleared a field of ten acres, very near the line, and was regarded as the owner of all within his grant, as well that which lay within the plaintiff's lines as without; and that from the time of his first settlement there he was accustomed to cut timber within his grant, and within the plaintiff's line, as he had occasion for it, and exercised all the acts of ownership over it, which men usually exercise over their woodlands, but he never erected any building or made any clearing or inclosure within the plaintiffs' lines.

The Jury found a general verdict for the defendants, and a motion was made for a new trial, on the ground:

That the verdict was against evidence, so far as related to the lands granted to *Robert Hutchison*, no certain or

notorious possession having been established within the plaintiffs' lines, and that the fact of having cut timber occasionally on, and exercising like acts of ownership over, it, was not such a possession as divested the plaintiffs.

Mr. Justice *Johnson* delivered the opinion of the Court.

This cause was tried before myself, and I distinctly stated to the Jury, that the facts proven in relation to the land granted to Hutchison, did not in my opinion constitute such a possession as divested the plaintiffs of the title, and upon the best reflection, I am yet satisfied with that opinion. The plaintiffs having, as to that part of the land granted to Word, acquiesced in the verdict, the only question is, whether the occasional cutting of timber and the exercise of such other acts of ownership over it as men are accustomed to do over woodland, is such a possession as will divest the owner of the right to the soil under the statute of limitations?

It is not necessary to the consideration of this question, to examine minutely all the provisions of the statute. It is sufficient to remark that a *possession* of five years is a bar to the plaintiff's right to recover, and what shall constitute the evidence of that possession, is the only question. In the case of *Jackson vs. Schoonmaker*, (2 *John. Rep.* 230,) the court held, that it should consist in "a real and substantial inclosure, an actual occupancy, a *pedis possessio*, definite, positive, and notorious." The good sense of these positions is, I think, apparent; they furnish on the one hand evidence of the honesty of the possession, and on the other they are calculated to apprise the plaintiff, unless he shuts his eyes upon it, that he who has such a possession, disregards his right or claims in hostility to him, and enables him to sue. But not so with him who enters only occasionally; he commits a petty trespass and disappears without scarcely leaving a mark behind, and if discovered at all, the owner is rather content to submit to it than seek redress through the means of a protracted and expensive law suit; or it may be done so secretly as to

clude detection; and it would be monstrous to allow one man to filch away the land of his neighbor without the possibility of guarding himself against it.

But it is sought to take this case without these rules, by extending the defendants' possession without the plaintiffs' lines, to the extent of his grant, on the doctrine, that a possession of a part is the possession of the whole. This argument is answered already, and all the objections which apply to the first position, apply to this with increased force; until a trespass had been committed, the plaintiff could not maintain his action, and this would be divesting him without the possibility of his guarding against it. I am therefore of opinion, that a repetition of casual trespasses *ad infinitum*, are but trespasses still, and is not such a possession as would bar the plaintiffs' right to recover; and I am inclined to think for the same reasons that this rule ought to prevail whether the lands could be usefully occupied or possessed in any other way or not, as the same objections would equally apply.

This rule has a direct application to the facts in this case, and a new trial ought to be granted.

Justices Colcock, Nott, Richardson, Gantt, and Huger, concurred.

O'Neal, for the motion.

M' Duffie, contra.

(*a.*)—"It is requisite, that the possession should be marked by definite boundaries." *Brandt vs. Ogden*, (1 John. Rep. 158.)

"Adverse possession must be marked by definite boundaries and be regularly continued down to render it availing. *Doe vs. Campbell*," (10 John. 477.)

"To constitute a disseisin of the owner of uncultivated lands, by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know, that there is a possession of the land adverse to his title; otherwise a man may be disseised without his knowledge, and the statute of limitations may run against him, while he has no ground to believe, that his seisin has been interrupted." "The occasional cutting of grass within a meadow cannot amount to a disseisin." *Proprietors of the Kennebeck purchase vs. Springer*, (4 Mass. T. R. 418-9.)

See also Ringold's lessee vs. Cheny, (4 Hall's Amer. Law Journ. 128.) Jackson vs. Waters, (12 Johnson 368.) Morris vs. Thomas, (5 Binney 79.) R.

JOHN M. HARRISON, *et al.* vs. GEORGE MAXWELL.

Where a sheriff's deed recited that a *Fi. Fa.* under which the land was sold had issued from a particular, when, in fact it has issued from another; this misrecital will not be fatal, as a ground of nonsuit.—(a.) In a sheriff's deed, a recital of the authority under which he has sold, is not indispensably necessary.

A bare recital in a deed, is not a substantial and efficient part of it.

A vested remainder in fee of land, may be levied on and sold during the continuance of a life estate, and while the tenant for life is in possession.

THIS was an action of Trespass, to try titles to land, tried before Mr. Justice Johnson, at Abbeville, Spring Term, 1820.

The land in dispute, had been sold by the sheriff of Abbeville district, on a writ of *Fi. Fa.* founded on a Judgment obtained in the Court of Common Pleas for Laurens district, at the suit of *M' Dowell* against the present defendant, and was purchased by *M' Dowell*, from whom the plaintiff's derive their title. The deed from the sheriff to *M' Dowell* recited, that the writ of *Fi. Fa.* had issued from the Court of Common Pleas for Abbeville district, but it appeared that no such execution had issued from that Court, and that there was no judgment entered upon in that Court between the parties.

The defendant's counsel objected to the admissibility of the judgment and execution from Laurens district, on the ground, that it was not the same recited in the sheriff's deed. But this objection was overruled.

The defendant then proved a title in *John Maxwell*, his father, who had died some time before, who, by his last will and testament, gave the lands to his widow during life or widowhood, and after her death or marriage, to the defendant in fee; and further proved, that at the time of

the sale by the sheriff, the widow was alive, unmarried, and in possession, and insisted that the estate which he had in the land at the time, was not such an interest as was the legitimate subject of a levy and sale, under a writ of *Fi. Fa.*

The Presiding Judge, being of opinion it was, so directed the Jury, and they found a verdict for the plaintiffs.

The defendant moved for a nonsuit, on the ground, that the misrecital in the sheriff's deed, as to the place where the judgment was obtained, was fatal, and the Court below ought to have granted a nonsuit.

And for a new trial on the ground of misdirection in the Judge, in charging the Jury, that the defendants interested in the land at the time, was the subject of levy and sale.

Mr. Justice *Johnson*, delivered the opinion of the Court.

So far as I am informed, it has been the invariable usage to incorporate in the sheriff's deed, a recital of the authority under which he sold, and I am satisfied that a strict adherence to that usage, would be productive of no mischief, but on the contrary, of great convenience, as well to the sheriff as to the purchaser. It would point the former to his authority to sell, if he was called on to answer, and would facilitate the latter in deriving his title. But I am persuaded that it was not indispensable. The bare recital in a deed, is not a substantial and efficient part of it, nor is it evidence of the facts recited, except between the immediate parties to it. (*Phillipps on Evidence*, 356.) The only object for which they are introduced, is to furnish a clue by which, at a remote period, those interested may, with facility ascertain from what sources their title is derived. *Preston*, in his *Treatise on Conveyancing*, (177,) remarks that the deed or will, from whom the title was derived, ought, in most cases to be recited, or at least there should be a reference to them, and

all such other facts should be disclosed, as would show the right. This, he says, will greatly aid the title at a future period. It will lead to the documents on which the title is grounded; or should they be lost or destroyed, will tend to satisfy future purchasers, that the title is correctly deduced. This he adds, however, can be done with prudence in those instances only, in which the title rests on clear grounds, and is not involved in difficulty, for on the one hand, no conveyancer of integrity will state that as a fact, which does not exist. And on the other, it is his duty to keep his client's title free from a disclosure, which at a future period might involve the title in increased difficulty, or raise a suspicion of its validity. The same doctrine will also be found in *Hobart*, (160.) Vide (4 *Cruise Dig.* 257.)

It would appear from these authorities, that a recital in a deed might or might not be made at discretion, and consequently a misrecital of that which is legally immaterial, is unimportant. It is not the recital of a power or authority to sell and convey, which gives the right, nor is it evidence of the right; it is sufficient that the right did exist, and that the seller acted upon it. As a general rule, therefore, it is not necessary, and I am unable to see any distinction as applicable to sheriff's deeds, although I readily admit its usefulness. The levy and sale invests him with the title, so far as to enable him to convey, and he does convey; and it is incumbent on the party claiming under him, to show these powers; the recital will not do it. An argument *ab inconvenienti* opposed to this position is drawn from the difficulty that would arise in tracing a title without this recital at a distant period. But that sufficiently also exists in every conveyance which does not recite the whole chain of title, and the purchaser may avoid it by memoranda of his own, which will answer all the purposes of a recital in the deed.

On the other question in this case, I think there is no difficulty. The act of the legislature of 1759, (*P. L.* 250, 2^d *Brev.* 1,) subjects houses, lands and other heredita-

ments and real estates, to be taken in execution, in payment of debts. These terms, cover, I believe every vested interest that a man can have in lands, and that they do the fee, will not be disputed. The fee simple of the lands in dispute, vested in the defendant under the devise on the death of the testator, notwithstanding the life or other estate carved out for the widow, and was therefore the legitimate subject of levy and sale. See (2 Bac. 699, *tit. Execution*, b. 2. Roll. Abr. 473. 2 Dall. 223.) It is argued however, that an entry by the sheriff for the purpose of levying during the existence of the life estate, would be a trespass on the rights of the tenant for life. This difficulty may, I think, be obviated even if an entry be necessary, which, I am disposed to question. If the law authorizes an entry, it must of necessity afford a protection for that purpose, so far as is necessary.

On both the grounds therefore, I am of opinion the motion ought to be dismissed.

Justices Colcock, Richardson, and Huger, concurred.

M^r Duffie, for the motion.

Noble, contra.

(a.)—JOHN HOLLOWAY vs. RICHARD BIRTWHISTLE.

TRIED before Mr. Justice *Nott*, at Edgefield, Spring Term, 1820.

This was an action of trespass to try titles to a tract of land, which the plaintiff claimed under a deed from the sheriff of Edgefield district, to *John S. Glascock*, made in pursuance of a writ of *Fi. Fa.* against *Wm. Shaw*, at the suit of the Executors of *Taylor*. In the deed from the sheriff to *Glascock*, the *Fi. Fa.* was recited as issuing from the Court of Common Pleas for Abbeville district. But the Judgment and execution produced in evidence, were of Edgefield district, and there was no proof before the Court that there was no such judgment as recited in the deed in Abbeville, and the deed set out other boundaries of the land than those mentioned in the levy endorsed on the *Fi. Fa.* but so far as the boundaries were mentioned in the levy, they corresponded with the deed.

An objection was made on the part of the defendant, to the admissibility of the record of the judgment and execution in evidence, on two grounds:

1st. Because it was not the same recited in the sheriff's deed.

2d. Because it did not appear from the deed, that the land conveyed was the same that had been levied on.

The Court sustained these objections, and nonsuited the plaintiff. And a motion was made to set aside the nonsuit.

Mr. Justice *Johnson* delivered the opinion of the Court.

This case differs from one of the questions made in the preceding case of *Harrison vs. Maxwell*, in this, that there was no proof that the judgment recited in the deed, did not exist, and that there was some difference between the boundaries set out in the deed, and that described in the levy endorsed on the execution.

If the doctrine attempted to be established in that case, be correct, it follows that it is sufficient to show that the sheriff was authorized, and did sell; and the judgment and execution from Edgefield, prove those facts. And it could not therefore be necessary to show a further power derived from an execution from Abbeville. This, therefore, is an answer to the first ground of objection.

The variance between the land described in the levy, and that described in the deed, was, I think a question for the Jury. Both describe it as lying near Cambridge, and so far as it is described in the levy, it corresponds with the deed, although it is true the deed does give other boundaries than those mentioned in the levy. Whether a particular tract of land, or any other article described in writing, is the same which we know or see, must always be determined from evidence *abunde*. It is impossible from the nature of things to point it out with certainty, unless it is present, but it may sometimes be so described, as to render it probable. If it is, that is sufficient, if it is not parol, proof is admissible. On this principle, lands represented in the grant as lying in one place, have been permitted to be located in another.

The motion, I think, therefore, ought to be granted.

Justices *Colcock*, *Richardson* and *Huger*, concurred.

Brooks, for the motion.

Stark, contra.

R.



THOMAS RICHARDS 'vs. JAMES M'DANIEL and ADAM RICHARDS.

Under the act of congress of 1802, respecting naturalization, (requiring that the alien should, three years at least, before his admission as a citizen, give notice, that it is his intention to become a citizen, &c. and that at the time of his application to be admitted, must declare on oath, that he will support the constitution, &c.) it will not be a compliance with the requisitions of the act, if the alien at the time of his giving notice of his intention to become a citizen, take the oaths required at

the time of his admission to citizenship, unless he take them at the time of admission also.

A certificate of naturalization irregularly obtained, may be set aside.

THIS was an action of trespass to try title, tried at Pendleton, Spring Term, 1820, and both plaintiff and defendant claimed through William Richards who died intestate, in 1809.

The title in the intestate was clearly proven, and the only question was, whether the late E. M'Daniel (through whom defendant claimed) was legally naturalized? To prove, that she was naturalized, a certificate, dated the 4th June, 1810, together with the minutes of the court, was produced.

Plaintiff in reply, to show the certificate illegal, produced the original petition, &c. by which it appeared, that she applied in March, 1810, to be permitted to declare her intention to become a citizen, and in which she states she has been in the state since 1803. This petition was made after the commencement of this action, and she died a few months after. The plaintiff then proved by major Miller her arrival in Charleston, in 1804, and that she immediately went to Pendleton and was never out of the district afterwards. The plaintiff insisted, that the certificate was illegally obtained, as she was not entitled to it by the act of congress of 1802, until three years after the filing of her petition and declaring her intention, &c.

But the Presiding Judge charged the Jury, that parol evidence was inadmissible to contradict the certificate of naturalization, and the Jury found a verdict for the defendant.

The plaintiff moved for a new trial, on the grounds:—

1st.—Because the Presiding Judge erred in charging the Jury, that parol evidence was inadmissible to contradict the certificate.

2d.—That the facts in the petition and other proceedings were insufficient, to prove the certificate illegal, as they were bound to presume the certificate correct.

3d.—That he charged, that they were bound to presume, that the naturalization was as early as possible under the existing laws.

The opinion of the Court was delivered by Mr. Justice *Richardson*.

The act of congress of 1802, (6 vol. p. 74,) permits aliens to become citizens generally, provided they shall have declared, &c. three years at least before admission, the intention to become citizens, &c. and to renounce their former allegiance, &c. and at the time of admission three years after such declaration, the same act requires the applicant to take the oath of fidelity to the constitution, as well as the oath of naturalization, &c. (*Grayd. Dig.* 309.)

The proceedings in the case before us were as follows :

1st.—A petition to wit: To the Honorable *Thomas Waties*, Esq. one of the Associate Judges of the State of South Carolina. The humble petition of *Eleanor M'Daniel*, SHEWETH, That your petitioner is an alien born in the kingdom of Ireland, under the allegiance of the king of Great-Britain, and that your petitioner is desirous of becoming a citizen of the United States of America. Your petitioner therefore prays, that your Honor *would cause to be administered* in open court, the oath prescribed by the act of congress to be taken by aliens intending to become citizens of the United States, and intending to renounce their allegiance to every other prince, potentate, state or sovereignty whatever, and your petitioner will pray.

ELEANOR M'DANIEL.

Be it so.

THOMAS WATIES.

March 27, 1810.

We do certify, that we have known *Eleanor M'Daniel* since the year 1803 ; that she has resided within the jurisdiction of this state, since that time ; that she is a woman of good moral character, attached to the constitution of the

United States of America, and well disposed to the good order and happiness of the same.

JOSEPH DOBSON,
BUCKNER SMITH,
JOHN BELL,
JOHN GRISHAM, Q. V.

The prayer is, that certain oaths may be administered to the petitioner, and nothing more. Upon the petition and *fiat* of the Judge, the applicant took the following oath:—

State of South-Carolina—Pendleton district.

Eleanor M'Daniel, being duly sworn in open court, makes oath, that she has resided in this state ever since the year, 1803, and that she will support the constitution of the United States and this state; and that she doth absolutely and entirely renounce and abjure allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly the king of Great-Britain and Ireland, under whose allegiance she has been.

ELEANOR M'DANIEL.

Sworn to and subscribed in open court, March 27, 1810,

JOHN T. LEWIS, C. C.

I do hereby certify the above a true copy of the original, filed in my office,

JOHN T. LEWIS, C. G.

Pendleton district, 15th April, 1820.

On the 4th of June, in the same year, the clerk issued a certificate of naturalization.

Upon these proceedings, the question arises: Are they sufficient testimony, that Eleanor M'Daniel was legally admitted to the rights of citizenship, under the act of congress of 1802? For this purpose, we need look no further than the records themselves. The petition prays, that the oaths required to be taken by those who intend to become citizens, and intending to renounce allegiance, &c. may be administered. Whereupon, instead of the oath, of the intention to become a citizen,

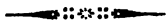
and the intention to renounce allegiance, &c. as set forth in her petition, she actually took the oath of fidelity to the constitution, and that she did then renounce allegiance, &c. which could have been required, not then, but three years after, upon a second application to become a citizen, predicated upon the oaths before taken, of the intention so to do. The oaths she took, certainly set forth the intention, for they show both the intention, &c. and the act of renouncing her former allegiance. But the superfluous oaths taken then, could not dispense with the necessity of the second application, three years after, and the required oaths being taken merely because she had taken them needlessly upon another occasion. The Judge by his *fiat*, directed the oath of intention, &c. to be administered, which is a preparatory measure. She took that oath, and more, which was harmless, but still she had performed simply what was then required, and could not dispense with the *sine qua non* of her admission to citizenship, three years after. The clerk, in less than three months after, of his own mere motion, granted the certificate of naturalization. This was the error of a ministerial officer. The Court said, let her now pass through the legal forms, preliminary to her becoming a citizen three years hence. She does so, and much more; so that the Judge was obeyed; but the preliminary preparation was no more than perfect, and she had not yet become a citizen. The subsequent act of the clerk, then, in issuing the certificate of naturalization, was unauthorized. He drew a conclusion, which the Judge had not made; and exhibited as an act of the Court, that which had not been done. The mistake below was easily made by respecting the after act of the clerk, as the order of the Court, or by concluding from the forms passed through, that the applicant had been actually received as a citizen, whereas, by looking into the petition, which unfolds the object in view, to have been preparatory only, and by regarding the act of Congress, which assures us, that any farther object, would, at that time have been illegal; we perceive she had taken the

first step only; and the act very wisely requires three years before the second can be taken, in order that the applicant may reflect maturely and the country have some acquaintance with the stranger, who proposes himself for our adoption. In a word, the first step is no more than a solemn and public declaration of an intention to renounce all foreign allegiance, and to adhere to us. The *locus penitentiae* remains for three years with the applicant, and we are fairly notified, so as to enquire who and what he may be, having performed this precedent condition, showing his intention solely; if at the end of three years, he shall execute that declared intention, by actually renouncing all allegiance elsewhere, and by swearing positive adherence to our constitution, and in addition thereto, shall prove his good character, he may become a citizen. All these acts required to be done at the end of three years, after the intention had been declared, *Eleanor M' Daniel*, did in fact perform, but unluckily, she performed them three years before she could with effect. At the time of their performance, they were superfluous, and could not authorize the certificate given by the clerk; nor was such certificate ordered by the *fiat* of the Judge.

The motion is therefore granted.

Justices *Colcock* and *Nott*, concurred.

N. B.—See S. C. 2 Const. Rep. 18. S. C. Col. Nov. Term 1818. S. C. Col. May Term 1821.



BILLY, a slave, *ads.* THE STATE.

The act of 1819, (enacting, that thereafter all justices, &c. then in commission who had not qualified before the Governor, shall within ninety days after the passing of the act, qualify before the clerk, &c.) does not embrace justices in commission who had qualified under the act of 1800.

It is not requisite to the validity of the office of justice of the peace, that the incumbent should have signed the roll under the act of 1778. A commission is not indispensable in order to discharge the duties of a public office *ut semble*.

A justice of the peace is legally qualified to act as such without a commission.

TRIED before Mr. Justice *Richardson*, at York, March Term, 1820.

On the part of the defendant, his counsel moved for the writ of prohibition, in order to prevent the execution of the sentence passed by the court of justices and freeholders, who had tried and condemned Billy, under the act of 1740, (*P. L.* 163, 229-44.)

The motion was predicated upon the following allegations :—

1st.—That the presiding justices had not been commissioned by the governor.

2d.—That they had not signed the roll in the secretary's office according to the act of 1778, (*P. L.* 301. 1 *Brev.* 469.)

In the history of this case, it appears, that after sentence had been passed upon Billy, it was suspended by a former motion for a prohibition (*ante* 174;) whereupon the sentence was again pronounced in January last; and being again suspended by the governor, or for some cause, the sentence was again repeated in April last: From these facts, another ground was taken, to wit: That supposing the justices originally qualified, yet they were incompetent in January last, to repeat the sentence, because they had not then taken the oath prescribed by the act of 1819, though they did so afterwards.

The opinion of the court was delivered by Mr. Justice *Richardson*.

I will first notice the minor grounds of the motion. It is not denied, that the justices had taken the oaths of office before two justices (one of the quorum) agreeably to the act of 1800, (*2 Faust* 360:.) But the act of December 1819, enacts, that thereafter "all justices, &c. now in commission, who have not qualified before the governor, shall within ninety days after the passing of this act, qualify before the clerks," &c.

It might be said, with great reason, that this act cannot embrace justices who had been duly qualified under the act of 1800, and who were truly in commission at the time of passing the act of December last, but must have been intended to give a second opportunity of qualifying, to certain justices, who had erroneously taken the oaths of office before some one of the judges or other magistrate, and not before either the governor, according to the act of 1778, or before two justices, according to that of 1800, either of which would have been sufficient.

In the case of the *State vs. Hayward*, (1 Nott & M'Cord 546,) for perjury, it appeared on the part of the state, that the justice, before whom the oath had been taken, had himself taken the oaths of office before a single judge only, instead of the governor, or of two justices under the acts before noticed, whereupon it was decided, that perjury could not be predicated of the swearing, however false. From this decision there appears to have arisen, a notion, that justices must have qualified before the governor; and hence probably the peculiar phraseology of the act of December last, i. e. "who have not qualified before the governor," &c. as if the act of 1800 had been laid aside. Surely the act could not have been intended to disfranchise men duly in office, though they had not qualified before the governor; but was evidently to reinstate such as had taken the oaths irregularly. Now the justices before us had taken the oaths of office duly and properly under the act of 1800; and through abundant caution they again qualified before the clerk, under the act of December last, and within the ninety days prescribed, i. e. (the one on the 19th January, and the other on the 16th March.)

Again, the condemnation which is to be carried into effect now, was made before the act of December last; and the sentence was finally pronounced since the justices qualified under that act, i. e. in April. Admitting then, that the pronouncement of the sentence in January was a nullity, as being before their qualification, under the act of December, yet passing the sentence in April, being after

such second qualification, was legal, and under that view had become indispensable.

Let us now enquire, if the office of a justice cannot exist, unless he has signed the roll under the act of 1778?

The words of this act are, &c. "shall at the time of qualification, sign a roll, which shall be lodged in the secretary's office, that all persons may resort thereto for their information, and thereby discover who are acting magistrates;" and then proceeds to inflict a penalty upon such as take upon themselves to act without complying with such directions. But this act does not make the signing the roll a condition precedent to going into office; though it very wisely holds out the terror of punishment for neglecting to sign it.

I will now turn to the most important question made in the case: Is a commission indispensable, in order to discharge the duties of a public office? All that we find in the constitution upon the subject, is in the 3d Sec. of the 8th Art. to wit: "All commissions shall be in the name, and by the authority of the State of South-Carolina, to be sealed with the seal of the state, and be signed by the governor."

In the 6th Art. the oath of office is prescribed, preceded by the following absolute requisition, to wit: "All persons who shall be chosen or appointed to any office of profit or trust, before entering on the execution thereof, shall take the following oath, &c. Mark the distinction; the oath is required to be taken before entering upon the discharge of official duties, while commissions are noticed, only bearing a certain style of authority, and the seal of state, and to be signed by the governor. Here so much is left to construction, that it might suffice to say, at least as it regards Justices of the Peace, that no commission having been ever issued to any of them since the constitution of 1791, if before, such long practice, presupposes a rational foundation. And such uniformity, from the adoption of the constitution, must, upon a question of any uncertainty, have somewhat of the weight of

cotemporaneous expositions. For a construction thus placed by long usage, in such a case as this, conveys the impression that the opinions of the skillful had been obtained for its sanction. To change it, would be, at least inconvenient, and might annul the proceedings of every Justice in the state. The constitution is no more than a recognition of general principles; but they often require an explanation of their true import, which is to be found in judicial decisions, legislative expositions and received practice. These explain and illustrate, and finally fix one precise understanding; without which, words are too variable, and general principles too easily perverted, to be relied upon. But is it not at least doubtful, whether a commission is not essential to the discharge of official duties generally? We take our principles, and derive our theory from the English Common Law. Let us regard it, but principally its reason. Commissions, it is said, must be by deed, (2 *Salk.* 536,) and words of creation must be used, as *constituimus*, &c. (16 *Viner* 102.) Its general definition is the warrant, or letters patent, which authorize the nominee to act or determine. The same as *delegatio* in the Civil Law, (see title *Commission and Officer*, in *Jacob and Viner*,) and at Common Law, the Commission ceases with the demise of the King. (*Dyer*, 289.) In England, the King may command the services of every subject. (1 *Salk.* 168.) He is the head of the Church, the fountain of honor, and the source of judicial and ministerial power. He is the universal officer from whom all offices are said to be derived. (12 *Co.* 116. 1 *Roll.* 206. 1 *Black. tit. Prerogative*.) This is strictly the English Common Law theory. For instance, from the *Aula Regis*, he parcelled out his judicial functions; and from the executive chair, he continues to delegate his ministerial powers. Every office there emanates then from this effusive regal source, and every officer, even the prime minister, whom one might fairly deem the true executive, is but the *Phaeton* of his day.

Regarding then the common law, we easily perceive,

why a commission may be essential under the English government. There in a word, it is at once, the expression of the royal will, and the partial delegation of his power. There, for the purposes of his office, the officer is the agent of the king, and the commission is his letter of attorney, wherein he finds his power, of what kind, and to what extent. But take away the reasons, and the same consequences do not follow. In this country the officer derives no power from the chief magistrate. In this state, indeed, he has not much to spare; and the commission becomes the mere certificate of election, or the formal annunciation of appointment: And the incumbent, both in theory and practice, is to regard the constitution and laws of the people, whose minister he is, as his only letters of attorney. Here then the commission constitutes no part of the authority or qualification of an officer, and in a question upon his functions or immunities, has as little to do as the mode of conveyance through which the commission may be sent to him. (*See 1 Cranch Marbury vs. Madison.*) And the true constitutional qualification, I mean the oath of office, may be taken before or after, and has no essential relation to, or dependence upon, the commission.

The motion is therefore dismissed.

Justices *Johnson, Colcock, Nott, and Huger*, concurred.

Mr. Justice *Gantt* dissented.

Rogers, for the motion.

Williams & Nott, contra.



WILLIAM M'CULLOUGH vs. JOSEPH M'CULLOUGH.

A landlord brought an action on the case against his tenant for waste committed on the premises, and the declaration contained a count in trover for the conversion of a quantity of plank, &c. Plea, not guilty, and verdict for the landlord for eight dollars, *ruled*, that the plaintiff was not entitled to costs unless he recovered 20% currency, as the right and title of property was not put in issue.

TRIED at Greenville, Spring Term, 1820.

The plaintiff brought an action against the defendant, who was his tenant, for waste committed on the premises during the term, and the declaration contained also a count in trover for the wrongful conversion of a quantity of plank and scantling.

It was admitted, that the plank and scantling were a part of the materials of a house, the pulling down of which was the waste complained of.

The defendant pleaded not guilty, generally, and a verdict was found for eight dollars for the plaintiff.

The clerk refused to tax *full costs* for plaintiff, and the question, whether he was entitled to full costs or not, came before the court in the form of a rule against the clerk.

The Presiding Judge, being of opinion, that he was not, dismissed the rule, and a motion was made to reverse that decision and to make the rule absolute.

Mr. Justice *Johnson*, who decided the cause, delivered the opinion of the Court.

Costs were not allowed at common law. The right of the plaintiff to have his costs taxed in this case, depends therefore on the construction, or rather application of the acts of the legislature, regulating them. The act of 1799, (*1 Brev. 194, tit. costs, ss. 19,*) provides, that thereafter, "In all actions of trespass to try titles to land; in all actions of trespass on the case; in all actions of trover, and in all actions of detinue, or any of them, brought to establish or try the right or title in any kind of property, if the plaintiff establishes his right of property therein, he shall in every such case recover and have his full costs of suit, whenever the verdict shall be above four dollars." If this case falls within the class of cases pointed out by this act, the plaintiff would be entitled to have his full costs, if not, it comes within the general provision of the act of 1744; (*P. L. 214.*) and he must recover 20% currency, (§ 12 24,) to entitle him to costs.

To entitle a plaintiff to full costs where the damages

recovered exceed four dollars only, the act of 1799, makes it an indispensable ingredient, that it should have been brought "*to establish or try the right or title*" to property, and the only mode of ascertaining for what purpose an action was brought is by the inspection of the record. Let us then examine this record and enquire whether it was brought to try the right of property. It is an action on the case, and the plaintiff declares for waste committed by the tenant; so far the plaintiff assumes a right of property in himself, and does not propose to put that question in issue, nor is the right of property necessarily involved, nor does the plea of not guilty put it in issue; it in effect denies the waste only. The defendant may however put it in issue, if he thinks proper by contesting the plaintiff's right of property, by the pleas of *liberum tenementum* or *nil habuit in tenementis*; but until he does so, the right of property is not the subject of dispute.

It is urged, however, that by the addition of the count in trover, the right of property was put in issue, and that the plaintiff is therefore entitled to costs. I am not disposed to enter into an enquiry, whether this count can be regularly joined in an action for waste, perhaps it may; but I will remark, that the action of trover does not necessarily involve the right or title to property, as where it is brought for a temporary conversion; but in any view of it, I think it cannot avail the plaintiff. It is admitted, that the count for trover was intended to cover the waste complained of, so that, in point of fact, the title to property did not come in issue, nor was it necessarily in point of law. The motion is refused.

Justices Colcock, Nott, and Richardson, concurred.

Mr. Justice Gantt dissented.

Mr. Justice Huger absent.

Earle, for the motion.

M^r Duffie, contra.

JARVIS ASHBELL vs. MARTIN WITT.

It is not actionable, to say of a man, "he swore a d—d lie before 'Squire Lamkin," and that "he was forsworn, and that he (the defendant) would overthrow his oath, so that it should never hurt a negro."

Where words are not actionable, without a *colloquium*, of which no evidence is given, the case will not be referred to the jury; but the Court will nonsuit the plaintiff.

TRIED before Mr. Justice *Richardson*, at Edgefield, March Term, 1819.

In this case the plaintiff proved that the defendant said "he swore a d—d lie before 'squire Lamkin, and that "the plaintiff was forsworn, and he the defendant would overthrow his oath, so that it should never hurt a negro." It was also proved, that Lamkin was notoriously an acting magistrate.

On this evidence, the Judge nonsuited the plaintiff, which nonsuit he moved to set aside :

1st. Because words are to be taken in the sense in which they would be received by the common sense of those who hear them, and consequently the words used were actionable.

2d. Because it ought to have been submitted to the Jury to decide upon the construction of the words : What charge is actionable, is matter of law ; but what words amount to that charge, is matter of fact, upon which the plaintiff had a right to the opinion of the Jury.

Mr. Justice *Richardson* delivered the opinion of the Court.

It was not seriously argued that the slanderous words charged and proven, are actionable *per se*. If it had been contended that they were so, the case from 2 *John*. 10, (*Ward vs. Clark*,) and from 8 *John*. 109, (*Vaugh vs. Havens*,) would have been a conclusive answer to the argument.

But it was argued that in as much as there was a *col*

loquium laid in the declaration, by which the words were made to relate to and mean a charge of perjury, supposed to have been committed by the plaintiff, when giving evidence in a named judicial proceeding, that the testimony should have been left to the Jury to determine if the allegation of a *colloquium* had not been made out, and thereby the words constitute a charge of perjury.

Every material allegation must be proven; and if there be any evidence adduced to prove it, the Jury are to determine if the proof be full and conclusive. But if there be no proof of the allegation, the Judge is to decide; for then there is no case to be submitted to the Jury. Now there was not a word proven of the *colloquium*, without which, the words were not actionable, for the addition of "before Squire Lamkin is surely no *colloquium* of a judicial proceeding; and the mere allegation in the declaration cannot prove itself. It follows that the words not being actionable in themselves, and not being changed from their usual import, by attending circumstances actually proven, the nonsuit was proper, and the motion is dismissed.

Justices *Colcock*, *Nott*, *Gantt* and *Johnson*, concurred.

M^r Duffie, for the motion.

Feter, contra.



ANN REYNOLDS *ads.* The STATE.

An Indictment under the act of 1816, to prevent gaming, against a person for permitting persons to play at cards in her house, being a public house, is not good, unless it state that the persons were playing at such games as were not excepted in the act; and where a conviction has taken place on such an indictment, judgment will be arrested.

Where, in the enacting clause of an act, exceptions are enumerated, it will be necessary, in an indictment under the act, to negative the exceptions.

THE defendant in this case was indicted under the act of 1816, entitled, "an act the more effectually to prevent the pernicious practice of gaming."

The act provides, that if any person or persons, shall play, &c. "at any game or games with cards or dice, &c. except the games of billiards, bowls, chess, backgammon, drafts or whist, when there is no betting on the said games, &c." such person or persons, upon being convicted thereof, shall be imprisoned, &c. The act then goes on to subject the keepers of public houses under the like circumstances to the same penalties.

This indictment states, that the defendant, in a certain public house, being possessed and occupied by her, permitted "Cassity and divers other idle and disorderly persons to be and remain, and then and there, in her presence, to play at cards, contrary to the form of the act of assembly."

The defendant was convicted, and this was a motion in arrest of judgment, on the ground, that there did not appear to be any offence charged in the indictment.

Mr. Justice *Nott* delivered the opinion of the Court.

An indictment is said to be a plain brief and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. And it must state the crime with as much certainty as the nature of the case will admit. In this case the defendant is merely charged with permitting persons to *play cards* at her house. And as that is not, under all circumstances, unlawful, she may, for any thing that the Court can perceive, be innocent of any offence.

But it is contended, that it is not necessary to state in an indictment, that the defendant does not come within the exceptions of the act, or to negative the provisos it contains. This appears to be a correct position, when the provisos and exceptions are in distinct clauses of the act. But if they are contained in the enacting clause, it will be necessary to negative them, in order that the description of the crime, may, in all respects correspond with the act. (1 *Chit. Crim. Law*, 192, 284.) The indictment ought, therefore, to have stated, that the persons so play-

ing, were betting on the game, or it should have negatived the exceptions, or in some other manner set out the facts, so that it might appear that the defendant had committed some one of the offences prohibited by the act. The Court is of opinion, that the offence is not set out with sufficient precision, and that the judgment must be arrested.

Justices *Colcock, Gantt, Johnson, Richardoon* and *Huger*, concurred.

Levy, for the motion.

Stark, Solicitor, contra.



SAMUEL FOSTER *et al.* vs. SAMUEL CHERRY.

In an action of trover for certain negroes where they had been formally delivered to the plaintiff and a deed executed to him at the same time for them, he cannot recover, unless he produce the deed or show the loss of it.

Where a father had a deed written, of certain negroes, to his children, and he makes a delivery of the negroes, and immediately afterwards executes the deed, this will be regarded as one entire transaction.

Where a deed of negroes has been made to a person, and the property delivered, it will be regarded as a delivery to the uses pointed out in the deed.

THIS was an action of trover, for a negro, Joe, tried before Mr. Justice *Johnson*, at Pendleton, Spring Term, 1820.

The plaintiffs claimed under a gift from their father, *John Crow Foster*, made in 1808, who had sold Joe to the defendant, in March, 1816, for a full and valuable consideration.

Reuben M Kenzie, called by the plaintiffs, swore, that in October or November, 1808, he was sent for by *John Crow Foster*, and went to his house, and he stated to him that he was about to give some negroes to his children, the plaintiffs, all of whom were then young, and had called on him to be a witness to the transaction; and that he

then made a very formal delivery to them of several negroes, and among them the negro Joe, by declaring, that "for the natural love and affection he had for them he gave and delivered, &c."

A number of witnesses were sworn and a great deal of evidence given on both sides, on the question, whether this gift was fraudulent or not, and finally *John M'Crosskey*, called by the defendant, stated, that he was present when the delivery spoken of by the witness, *M'Kenzie*, was made, and agreed with him as to the time and manner of it. But he added, that *John C. Foster* had before procured a deed to be written, giving the negroes to his children, and as well as he recollected, it contained some provision for his wife, in relation to the same negroes, and that he, immediately after the delivery, executed the deed, and himself and *M'Kenzie* subscribed it as witnesses, and that it was delivered to Mr. *Samuel Earle*, to have it recorded in the clerk's office, and that he had not seen or heard of it since.

The witness, *M'Kenzie*, being called again and re-examined, accorded in this further statement of facts, except that he had no recollection, that the deed contained any provision for the wife. It was also proved, that *John Crow Foster* retained the possession of Joe, up to the time of the sale to the defendant, and that the plaintiffs were then minors and lived in his house.

The plaintiffs being unable to prove the loss of the deed or to give of it any account whatever, the counsel for the plaintiff, on the suggestion of the Presiding Judge, that without some proof on this point, the verdict must be for the defendant, suffered a nonsuit with leave to move to set it aside, on the ground :

That the delivery anterior to the execution of the deed vested the right of property in the plaintiffs, and they had their election to rely on the parol gift and delivery, or the deed.

The opinion of the court was delivered by Mr. Justice *Johnson*, who tried the cause.

The position assumed in the grounds of this motion, no one will attempt to controvert, for where there is a parol gift and a delivery of a chattel which may be passed without the solemnity of a deed, no subsequent act of the donor, by deed or otherwise, can change or alter the right vested by it. But I think it equally clear, that it has no application to this case.

The delivery of a chattel does not necessarily vest an absolute and unqualified property in the receiver. The giver has the right to direct to what uses and by what tenure it is to be held. In this case it is contended, that the delivery and the declaration accompanying it prove the intention of the donor to give an absolute and unqualified property. But this is not the best evidence the nature of the case admitted of; there was a deed executed at the time and no account has been given of it, and the witnesses disagree about the contents of it.

It is said however, that the delivery was prior in point of time to the execution of the deed, and therefore succeeded it. When we are prepared to exclude a part of the *res gestæ* or to garble evidence by admitting that which makes against a party, and excluding that which makes for him, this doctrine may be held, but not before. It will be recollected, that, in this case, the donor had procured the deed to be written before, and executed immediately after, the delivery; now either, without the aid of the other, would have passed the property, but both constituted one entire transaction, and the deed, being a part of the *res gestæ*, was the best evidence of the intention of the parties, and ought to have been produced or accounted for.

The fact, that the witness thought the deed contained a provision for the wife, furnishes, I think, a practical illustration of the correctness of the rule. If this be true, it may contain provisions inconsistent with their right to recover, and properly does, as the wife is still living. I

would not willingly impute to any man the madness and folly of making a formal and unqualified gift to his children, when he had before procured a deed to be written declaring his intention inconsistent with it, and immediately, in the same moment, affixed his hand and seal to it. The delivery therefore cannot be otherwise regarded than as a delivery to the uses pointed out in the deed.

The motion must be discharged.

Justices *Colcock*, *Nott*, *Richardson*, and *Gantt*, concurred.

Mr. Justice *Huger* absent.

M'Duffie, for the motion.

Davis, contra.



WILLIAM AIKIN vs. WILLIAM DUREN and ABRAM DUREN.

An unsealed instrument of writing in the form of a penal bond, whereby Thomas & A. B. Duren acknowledged themselves held and firmly bound in a certain sum, for value received, with a condition that the obligation shall be void, if the defendants should pay the half of a debt due by Duren & Ballard, is not void under the statute of frauds, as being an undertaking to pay the debt of a third person.
—(a.)

THIS was an action of Assumpsit, tried at Camden' Spring Term, 1820, before Mr. Justice *Colcock*, on the following note or instrument of writing :

South-Carolina—Kershaw district.

Know all men by these presents, that we the undersigned, are held and firmly bound, unto *William Aikin*, of Charleston, in the sum of fourteen hundred dollars, which has been for value received, this 28th day of August, 1819.

The condition of the above obligation is such, that if the undersigned should pay, or cause to be paid, to *William Aikin*, one half of a debt on several notes of hand, which

are due by the firm of *Duren & Ballard*, which in the whole, amount to about twenty-six hundred dollars, and does not exceed in the whole, twenty-eight hundred, the above obligation to be null and void. Witness our hands and seals, this 28th day of August, 1819.

THOMAS DUREN, jun.

A. B. DUREN.

The Presiding Judge, being of opinion, that this contract came within the principles of the case of *Stephens, Ramsay, & Co. vs. Winn*, decided in this Court, in the year 18—, which was held to be void under the Statute of Frauds, nonsuited the plaintiff. This was a motion to set aside that nonsuit.

Mr. Justice *Nott* delivered the opinion of the Court.

The only question in this case, is, whether the contract appears on its face to be within the Statute of Frauds, and therefore void under that statute. This instrument is in the form of a penal bond. The first, or obligatory part is merely a note of hand. It purports to be an original undertaking, and for a valuable consideration. The condition is no part of the contract. It only provides a method by which the contract may be avoided. And if it was expressly stated to be by the payment of the debt of a third person, I should not consider it as coming within the Statute of Frauds, because it appears to be founded on a good consideration.

The case of *Stephens, Ramsay, & Co. vs. Winn*, was a promise to pay the debt of a third person, without showing any consideration, or even expressing that it was for value received. But even if we look to the condition in this instrument, we are not bound to conclude, that this was an undertaking to pay the debt of a third person. The debt to be paid was due from *Duren & Ballard*. It may be, that *Duren*, one of the payers of those notes, is one of the parties to this contract. We are not to presume that he is another person. It is nothing more than, a renewal of

his note for the payment of which, the other has become his security.

It does not, therefore, appear to be a contract within the Statute of Frauds, and the motion must be granted.

Justices *Johnson, Colcock, Richardson, and Huger*, concurred.

Mr. Justice *Gantt* absent from indisposition.

Levy & M'Willie, for the motion.

Evans, contra.

(a.)—STEPHENS, RAMSAY, & Co. vs. RICHARD WINN.

MOTION to set aside a nonsuit, and grant a new trial. Action of assumpsit on a promissory note of hand, brought to trial before Mr. Justice *Brevard*, at Fairfield, November Term, 1809.

The note produced in evidence was in these words: "I promise to pay Stephens, Ramsay, & Co. or order, one month after date, the sum of 16l. 15s. 2d. sterling, on account of Doctor Street, which, when paid, will be in full to this 22d March, 1786. RD. WINN." It was objected by *Evans*, for the defendant, that this evidence amounted only to a promise to pay the debt of another; and that by the statute of frauds, the defendant was not legally chargeable, as the note did not amount to an agreement to pay the debt of another, nor was it such a note, or memorandum of an agreement to pay the debt of another, as the statute requires, but was a mere naked promise, &c. and cited the case of *Wain and another against Warlters*, (5 East. 10,) decided in the year 1804.

Clarke argued to the contrary.

The Presiding Judge said, that he was satisfied, the objection was valid and ought to prevail. He did not consider the case of *Wain and another vs. Warlters*, as authoritatively binding, but thought the reasoning contained in it answerable to show, that, to oblige one man to answer for the debt of another, there must be an agreement in writing, or a note, or memorandum of an agreement in writing. The word "agreement," he said, has a technical meaning, extending to the consideration of the promise as well as to the promise itself.

The writing therefore which is competent to bind one man to pay the debt, or answer for the default or miscarriage of another, must express the consideration. And parol evidence of such consideration is inadmissible.

He therefore held, that the written promise given in evidence was *nudum pactum*, as it appeared to have been made without any consideration. A nonsuit was ordered.

The motion was argued, May 4, 1810, before all the Judges.

Hooker, in support of the motion, agreed to the doctrine laid down by

the reporting Judge; but contended it did not apply to the case. The note, he said was not a promissory note, *i. e.* a note to pay money at all events. He quoted (1 Sel. 264. 1 Esp. Dig. 27. Bail. on Bills, 13. 1 Lord Raymond, 131.) He insisted it was not a case within the Statute of Frauds. The note, he said, imported a consideration, &c.

Stark, on the contrary, cited 1 Saund. 210-11, Wms. Ed. note.

The case remained under consideration till November, 1812, when it was decided, that the motion should not be granted.

Mr. Justice *Smith* dissented from the rest of the Court, and was of opinion, that the nonsuit ought to be set aside, as the note was sufficient to take the case out of the Statute, importing a sufficient consideration on the face of it.

The other Judges concurred in opinion with the Judge, who ordered the nonsuit. (MSS. of Mr. Justice *Brevard*.)

Note.—See 3 John. (New-York Term Rep. 210.) Act of assumption, (*Sears vs. Brink et al.*) on articles of agreement, viz. "this is to certify, that so much is the balance due, &c." objected that no consideration appeared.—Answered that consideration may be proved by parol, though the promise be in writing. Per Cur. The consideration must be expressed in writing—the whole agreement must be in writing.

6 East, 307, (*Egerton vs. Mathew*), action on the case for not paying for certain goods contracted for, by the following memorandum in writing: We agree to give Mr. Egerton, 19*d.* per lb. for 30 bales of cotton, &c.—objected, no consideration appeared, and nonsuit accordingly. Motion to set aside nonsuit. Had judged that the case was governed by the 17th clause, and not the 4th, of the Statute of Frauds, which concerns agreements to pay the debt of another. The 17th clause is satisfied by "some note or memorandum in writing, of the bargain, signed, &c." (See 2 B. & P. 238. 1 Ves. jr. 351. N. S.)

9 East, 548, (*Stadt. vs. Lill*. A. D. 1803,) a guarantee in writing, to pay for any goods which the vendor delivered to a third person, is good within the 4th Sec. of the Statute of Frauds, as containing a sufficient description of the consideration of the promise, viz. the delivery of the goods, when made, as of the promise itself, both of which are included in the word "agreement."

Note to pay \$60 in cattle, *value received*; not necessary to prove the consideration. (Vide 7 John. 321. 3 Caines, 286. 7 T. R. 350.)

A parol promise in writing is not valid, unless a consideration is proved: But see (3 Johns. 484. 2 Johns. 235.) "Value received," is *prima facie* evidence of consideration in a note or deed. (7 John. 321. 10 East, 431. See 10 John. 501. *Fisher vs. Fields*. Newld. on Contracts, 210, 565. 4 Bro. C. C. 377. 4 Cranch, 229. 4 John. 236. 3 Do. 210. 1 Atk. 13.

But see Ves. jr. Lord *Eldon's* opinion contrary to the cases in East.

LEROY BUSSEY *ads.* B. WHITAKER.

Where the maker of a promissory note had made his mark to it, and the subscribing witness was out of the state, proof of the handwriting of the subscribing witness was held sufficient.

MR. Justice *Nott* delivered the opinion of the Court.

This was a Summary Process on a promissory note, tried before me, at Edgefield, Spring Term, 1820.

The defendant made his mark, and the subscribing witness was out of the state. The only evidence of the execution of the note was proof of the hand writing of the subscribing witness. I thought that it had been held in this state, that such evidence was sufficient, and therefore gave a decree for the plaintiff.

This was a motion to set aside that decree, and to grant a nonsuit. But the Court are unanimously of opinion, that the decree is in conformity with the decisions which have heretofore taken place in this Court on the same question, and that the motion must therefore be refused.

Justices *Colcock*, *Gantt*, *Johnson*, *Richardson* and *Huger*, concurred.

Feter, for the motion.

Glascok, contra.



W. HAWKINS *vs.* F. HATTON *et ux.*

In an action, in which the husband is answerable in damages, the declarations of the wife cannot be given in evidence.

THIS was an action of trespass, tried at Newberry, before Mr. Justice *Nott*, Spring Term, 1820.

The trespass was alleged to have been committed by the defendant's wife; and the only testimony offered on the part of the plaintiff, was the wife's acknowledgment, that she had committed the act; and it was made a ques-

tion, whether her acknowledgments could be given in evidence against the husband. The Presiding Judge rejected the evidence and the plaintiff suffered a nonsuit. This was a motion to set aside that nonsuit.

Mr. Justice *Nott* delivered the opinion of the Court.

The only direct authority which I have been able to find, applicable to this case, is the case of *Denn vs. Joshua White & wife*, (7 D. & E. 112.) The court there says, "that the wife's confession of a trespass committed by her cannot be given in evidence, to affect the husband, in an action in which he is answerable for the damages and costs." (*Phillipps* 63.) Lord *Coke* says, a wife cannot be produced against the husband, as it might be the means of implacable discord and dissention between them, and the means of great inconvenience. The reason for excluding husband and wife from giving evidence either for or against each other, is founded partly on their identity of interest and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life even at the risk of an occasional failure of justice. (*Phillipps* 63.) It appears to me, that this case comes directly within the policy of the law. If a wife cannot be a witness against her husband, when on oath, *a fortiori*, her declarations ought not to be received as evidence against him.

The motion must therefore be refused.

Justices *Johnson*, *Richardson*, and *Gantt*, concurred.

Mr. Justice *Colcock* :

I dissent. I think the case does not come within the reason of the rule.

Mr. Justice *Huger* absent.

Bauskett, for the motion.

O'Neal, contra.

On an appeal from the ordinary, to the court of common pleas, it was referred to a jury to try the validity of the will; the jury found a verdict and established the will, on which the appellant's counsel entered up judgment and issued execution for costs, which on motion was set aside by the court.

TRIED before Mr. Justice *Colcock*, at Richland, October Term, 1818.

This was a motion to set aside a judgment and execution for costs, upon the ground, that the plaintiffs were not authorized to enter up such judgment or tax any costs in the case. It was an appeal from the decision of the ordinary, on the validity of a will. The case was tried by a jury, and a verdict given, which went to establish the will, and consequently ought to have gone back to the court from whence it came. But the appellant's counsel entered up judgment in this court, no damages having been given by the jury, and taxed his costs, and issued his execution. The Presiding Judge ordered the proceedings to be set aside, and a motion is now made to reverse that decision, on two grounds :

1st.—That the plaintiffs are entitled to costs.

2d.—That defendants, taking no step to levy proceedings after such a lapse of time, and money actually paid to the sheriff, have concluded themselves, unless they can show improper taxation, which is not pretended.

[Mr. Justice *Colcock* delivered the opinion of the Court.

At common law no costs were recoverable. If the plaintiff did not prevail, he was amerced *pro falso clamore*, if he did, then the defendant was *in misericordia* for his unjust detention of the plaintiff's right, and therefore was not punished with the *expensæ litis* under that title. But it grew into a practice to give costs in the damages where damages were found; and as lord chief baron *Gilbert* says, the justices would sometimes assess costs above the damages. (2 *Bacon's Abr. tit. costs*, 33, letter A.) Then

came the statute of Gloucester, which gave costs in certain cases, and afterwards a number of other statutes and acts of assembly; in none of which is embraced the present case. It did not originate in our court. It came from the court of ordinary; and to that court the verdict should have been returned; there if any where the appellant might have asked for costs. It is analogous to an issue out of chancery. The costs do not follow the verdict as a matter of course; but the finding of the jury is returned to the court that ordered it, where the costs are discretionary. (2 *Bacon* 56.) Where an issue feigned is ordered by the court and a verdict, the costs may be made to abide the event: But there it is considered as a case arising in the court, and stands on the footing of all other causes originating in the court, and may be regulated by any order. I think, I may venture to say, that this judgment and execution is without precedent.

The motion is dismissed.

Justices *Gantt*, *Johnson*, and *Huger*, concurred.

Starke, for the motion.

Clifton, contra.



WILLIAM CALDWELL, Sheriff, vs. ANN BOYD.

Where a defendant is unable to pay the gaol fees for his detention in prison, the plaintiff is liable to the sheriff for the amount.

THIS was a summary process brought to recover the amount of gaol fees, which accrued upon the confinement of one Thomas Busby by virtue of a *ca. sa.* at the suit of the present defendant.

The leading circumstances of the case are, that Busby was arrested and confined under a *ca. sa.* at the instance and request of the defendant from the 7th of April to the 11th of September, 1819; when, with her consent, if not at her instance and direction, he was set at liberty, being at the time insolvent, and unable to pay the gaol fees.

The case was tried, Fall Term, 1819, at Newberry, before Mr. Justice *Johnson*, who nonsuited the plaintiff; the present is an application to set aside the nonsuit, and that a decree be entered up for the plaintiff, for the amount of his demand.

Mr. Justice *Gantt* delivered the opinion of the Court.

From every view which I can take of the case, I think the plaintiff entitled to recover his demand for gaol fees, of the defendant. As sheriff he was certainly bound to take into his custody the body of Busby under a *ca. sa.* and it follows as clearly to every mind, that he was equally bound to provide sustenance for the prisoner. The old rule of letting a prisoner starve in the name of God, is rather too antiquate for modern use. It is stated, in argument, that the sheriff was told, that he was not bound to provide for the prisoner. Suppose he had, under this advice, permitted the prisoner to perish for want of sustenance, who, in such a case, would not consider the sheriff in the light of a murderer? And would it not be a reproach to the law, if in such a case he could not be made to suffer the penalty attached to that crime? I think it would. The prisoner is therefore in my opinion to be supported, and the expense must and ought to fall on the person for whose intended benefit the party was deprived of liberty; all the analogies of the law are in favor of the principle. It may be a hard case upon the defendant to have to pay those costs, after losing the debt, which the *ca. sa.* was intended to secure, but it often occurs that good money is sent after bad, and both finally lost. I think the nonsuit should be set aside, and the case reinstated on the docket for trial at the next court.

Justices *Richardson*, *Colcock*, *Nott*, and *Huger*, concurred.

Bauskett, for the motion.

O'Neal & Johnson, contra.

H. E. MACON vs. NATHAN COOK *et al.*

The officers who compose a Court Martial, are not liable to an action of trespass, for seizures under their sentence, unless malice or corruption be proven.

TRIED before Mr. Justice *Richardson*, at Fairfield, Spring Term, 1820.

This was an action of trespass, for taking the plaintiff's horse.

The defendants were officers in a troop of cavalry, and had holden a court martial in November, 1817, to try defaulters at a regimental muster; and had fined the plaintiff in § 7 21, for his absence therefrom, had issued execution and taken the horse, and had him sold to pay the fine.

The charges were, that the defendants had acted illegally, &c. and finally, it was contended, that their motive was corrupt, &c. To prove the plaintiff's case, Samuel Barber was called. He swore that the plaintiff was notified several times of the fine imposed, in December. In January, the witness received the warrant of Captain *Rabb*, and levied upon the horse of the plaintiff, who said he should not get the fine, but by selling the horse; and forbid the sale. But the witness sold him by virtue of the warrant, for § 130, which he deemed the full value, and returned the overplus to the plaintiff.

Col. *Havis* swore that he had ordered the Court Martial to be holden; and afterwards approved of the fines imposed. He supposed this one among the rest; but hearing there was a misunderstanding, he ventured to suspend the sale, in order to adjust the difference, or give the plaintiff an opportunity of appealing; and that he once actually met at —————, to hear any appeal which might be made, and plaintiff knew it; but still never appealed. Lieutenant *Delany* swore that the plaintiff was absent at the muster—that a general notice, according to the custom of the regiment, for all concerned to attend the court martial, was given; but no return of a

personal notice to the plaintiff was made to the Court, of which the witness was a member, and he was fined by default, as all others were under the same circumstances. This witness concurred in the sentence which was correct, according to his own judgment, and thought the other members did the same, without practising any thing like malice; and they afterwards gave time, that the plaintiff might pay the fine, &c. but he said he had nothing to appeal from, as he had not been notified, &c. This witness said the members of the Court took but one oath, (*Mil. Mil. Law*, 54,) but deemed it unnecessary to take the other, (see *Miller*, 20,) to keep secret each other's opinion, &c.

The Court charged the Jury, that in order to render the defendants (who had clearly acted as judicial officers,) liable in this action, it must have been made to appear, that they had acted corruptly; as for instance, maliciously towards the plaintiff; that this had been decided in the case of *Reid vs. Burdine*, wherein a justice of the peace had been holden not liable for mere error of judgment, while acting as a judicial officer. That two errors appeared to have been made: 1st. In fining the plaintiff without proof that he had been personally notified to attend the court martial. 2d. In not taking the oath prescribed by the Militia law, requiring the members to keep secret each others opinions; though they had taken the other oath prescribed. But as to the first, it had been proven that it was the custom of the regiment to give no more than a general notice on the day of the muster, as to the time and place when the court is to be holden, and that all were tried alike, which were reasonable proofs there was no corruption or malice in the particular instance before us, against the plaintiff.

That as to the other error, in taking but one oath, the witness declared the Court had deemed it unnecessary to take the other oath; and that from its purport (see *Miller*, 20,) "to keep secret," &c. the omission did not appear to argue corruption or malice; but a mere error, which may have been very innocently committed. That upon

both those points, Mr. Delaney's evidence had gone far to exempt the defendants from the charge of corruption or malice; and that their indulgence afterwards to the plaintiff, in postponing the execution, was a further favourable circumstance. But that the Jury must judge for themselves; and if the Jury perceived any corrupt motive in the defendants, they ought to be punished by a verdict of heavy damages. The Court also noticed, that the plaintiff had neglected to appeal, which he might have done at any time within fifteen days after notice of the fine imposed.

The Jury found a verdict for the defendants, whereupon the plaintiff gave notice, that he would move the Constitutional Court, at Columbia, for a new trial in the above case, upon the following grounds, viz:

1. Because the Court misdirected the Jury in charging them, that it was incumbent upon the plaintiff, in order to support his action, to have proved that the defendants acted corruptly and maliciously; and that it made no difference whether they were trespassers or not, so they did not act corruptly.

2. Because the verdict was contrary to law and evidence, in as much as it was clearly proved, that the plaintiff's property was sold by the directions of the defendants, without legal authority.

Mr. Justice *Richardson* delivered the opinion of the Court.

These two grounds are expanded into four in the brief; but they constitute but one in addition to the foregoing, namely, that the Judge erred in charging, that the plaintiff might have appealed in fifteen days after notice of the fine imposed.

In the written argument of the counsel of the plaintiff, he candidly concludes thus: But the great question is, whether the motive must have been corrupt, &c. according to the charge of the Court to the Jury. But this is no longer questionable. In the case noticed by the Judge, it was

unanimously decided, that for mere error of opinion, without corrupt motives, a judicial officer is not liable. And the proper tribunal, the Jury, have decided by the verdict, that there was no corruption. Indeed, it was not seriously argued before them, that the motive was corrupt, so deficient was the testimony upon that point; though the plaintiff has had the full consideration of it, as well as of that of the additional ground which supposes that the plaintiff could not have appealed within fifteen days after notice. But the act of 1809 (*See Mill. 44, and 2 Brev. 79,*) is explicit, that the fifteen days are allowed after the notice, and not merely after the fine imposed. Not one of the grounds is then tenable. And to conclude, it is evident that the action must have been predicated either upon the expectation, that corrupt motives would be proven, but of which there appeared but little proof, if any at all, or upon the supposition, that error in the Court Martial was sufficient, without corruption, which would seem to have been the case, from the argument before the Jury. But this view is estopped by the decision in *Reid vs. Burdine*, (*ante*, 168,) to which I must refer for the reasons of the principle. The motion is therefore dismissed unanimously.

Justices *Colcock, Nott, Johnson* and *Huger*, concurred.

Clarke, for the motion.

Peareson, contra.



JOHN F. GRIMKE vs. THOMAS BRANDON.

In an action of trespass *quare clausum fregit*, plea *liberum tenementum*, and a verdict for the plaintiff, the plaintiff is not entitled to a writ of *habere facias possessionem*.

THIS was an action of Trespass *quare clausum fregit*; plea *liberum tenementum*. Verdict for plaintiff.

Mr. *Gist*, on behalf of the plaintiff, stated that the de-

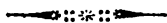
fendant, or some one under him, continued on the land, and moved for leave to issue a *habere facias possessionem*, and relied on the case of *Sumter vs. Lehre*, as authority for the order, which was refused. A motion was now made to reverse the decision below, and for leave to issue the writ.

Mr. Justice *Colcock* delivered the opinion of the Court.

It is clear such writ cannot be issued at the Common Law, and there is no statute law in the state upon the subject. The action is predicated on the possession of plaintiff, and a writ of possession is therefore unnecessary; we have no report of the case of *Sumter vs. Lehre*, and cannot therefore consider it as authority, to overturn the well established doctrine on the subject. The motion is dismissed unanimously.

Justices *Nott*, *Gantt*, *Johnson*, *Richardson* and *Huger*, concurred.

Gunning, against the motion.



AINSLEY HALL *et al.* vs. SARAH GOODWYN and MORRIS MOORE.

A devise of land without words of perpetuity, and where there is nothing in the will from which a fee can be raised by implication, vests only a life estate in the devisee.

The word "estate" in a will cannot be transferred from the preamble to the devising clause, so as to extend a life estate to a fee, where the introduction and the devising clause are in no way connected.

THIS was an action of trespass to try title, in which the plaintiffs claimed, as heirs at law of William Howell, senr. deceased.

The defendants claimed under Robert Howell, a devisee, under the will of the said William Howell.

If Robert Howell took a fee under the devise to him,

the defendants were entitled to hold the land ; if he took only a life estate, the plaintiffs were entitled to recover.

The only parts of the will which it appears necessary to notice, are the preamble, which is in these words, "and as touching such wordly *estate* as it has pleased God to bless me with in this life, I give, *demise*, and dispose of the same in the following manner and form, after all my just debts are paid : " And the devising clause to Robert Howell, which is in the words following : " I give and bequeath unto Robert Howell, son of Arthur Howell, deceased, a tract of land containing one hundred acres, on the south-west side of the great lake, where James Anderson formerly lived."

The cause was called for trial at Columbia, ——— Term, 18—, before Mr. Justice *Colcock*, who, being of opinion, that Robert Howell took a fee, ordered a nonsuit.

This was a motion to set that nonsuit aside.

Mr. Justice *Nott* delivered the opinion of the Court.

In all deeds or grants of land the word "heirs" is necessary to carry a fee simple. The rule has been somewhat relaxed in relation to wills. *No technical words of inheritance are required ; but the intention of the testator is to be received as the rule of decision.* And although the opinions expressed by Lord *Mansfield*, (2 *Doug.* 763,) and Judge *Buller*, (3 *T. R.* 356,) are probably correct, "that there is hardly any case of this sort, where only an estate for life is held to pass, but that it counteracts the testator's intention," yet I believe, that letting go the security, which technical terms affords to real property, has been introductory of mischief much to be lamented. It has opened the floodgates of uncertainty, and destroyed the peace of families by bringing into dispute half of the wills that are made. And even Lord *Mansfield*, whatever might have been his wishes on the subject, had not the "boldness," as Lord *Kenyon* expresses it, to innovate upon the law, as settled by a series of decisions of their courts.

But although technical words are not necessary, we must not be led astray by the generality of the expression; that the intention is to govern. Successive decisions have established rules by which the intention is to be ascertained, and which are now to be considered as land-marks to lead us with some degree of certainty, to the construction of wills as well as deeds; and it would be unwise and improper to overleap the bounds which have thus been prescribed for us, and to venture again into the broad field of conjecture in pursuit of a dubious intention.—Indeed the first departure from the old common law rule was merely an indulgence allowed to ignorant persons, *inops consilii*, of adopting their own mode of expression in the stead of technical terms, *yet, unless apt and fit words, expressive of that intention, and calculated to convey the same idea, are used, the legal construction must prevail.*

The rules, for the construction of wills, which I consider now very well established, are,

1st.—Where the testator makes use of *any words of perpetuity*, as, for instance, to “give to one forever,” or “to one and his assigns forever,” or “to one in fee simple,” it will convey an estate of inheritance, although no technical words are used, (*2 Black. Com.* 108,) or,

2d.—Where the testator makes use of *some word* sufficiently comprehensive to embrace the *interest* which he has in the land as well as the land itself, as the word “estate” or some other word of equally extensive import, (*Cowper vs. Marten et al.* 1 D. & E. 411. *Fletcher vs. Smiton*, 2 Do. 656. *Denn dem. Moore vs. Mellor*, 5 Do. 561. *Right vs. Sidebotham*, Doug. 763,) or,

3d.—Where the land itself is clogged with some *incumbrance*, or the devisee charged with some duty connected with the devise, the performance of which is inconsistent with any less estate, or in other words, where the express provisions of the will cannot be carried into effect without such construction, as where the payment of debts, legacies, and funeral expenses, accompanies the devise, &c. because the charges may amount to more than the life

estate would be worth. (3 Term Rep. 356, *Palmer et al. vs. Richards*. 5 Do. 561. 8 Do. 1 *Doe vs. Holmes*.)

I will not undertake to say, that there may not be other anomalous cases, where, from all the provisions of the will, taken together, such an intention may be inferred. But if there are any such, I have not come across them. I think therefore it may be considered as pretty well settled, that unless a case comes within one of these rules, no greater interest will pass than a life estate, without technical words of inheritance; and the law being so settled, we are not at liberty to depart from it.

It is not pretended, that the devise in question comes directly within either of the rules above laid down; neither do I understand it to be contended, that there is any thing in the particular provisions of this will to make it an exception. But it is said, that the word "estate" in the preamble may be transferred to the devising clause so as to vest the inheritance in the devisee; and as that seems to be the strong ground on which the question is to turn, I have examined the cases with some degree of attention, which it is supposed go to support the doctrine; and they do not appear to me to establish the position.

The cases most directly in point, on this subject, are *Beachcroft vs. Beachcroft*, (2 Vern. 690.) *Tanner vs. Wise*, (3 P. Williams 294.) *Ibbetson vs. Beckwith*, (*Talbot's cases* 157,) and *Grayson vs. Atkinson*, (1 Willson 333.) In the three first the word "estate" is not confined to the introduction, but is distinctly repeated in the devising part of the will. And in the last, the testator charges the devisee with the payment of several legacies, and directs him to sell all or any part of his real or personal estate for the purpose of paying his debts and legacies; and it was on that ground expressly, taken in connection with the other, that the lord chancellor held, that a fee passed. In the case of *Beachcroft vs. Beachcroft*, also, the estate is subjected to the payment of debts, and a legacy of three hundred pounds, so that all those cases come within one or more of the rules above laid down. And in none of them

are the introductory words relied on any farther than as one circumstance among others from whence the intention may be inferred. And even though there should appear to be some confusion among the old cases, the modern authorities are uniform on the subject. In the case of *Frogmorton vs. Wright*, (3 Willson 414,) Lord Chief Justice *De Grey* says, there is no case where it ever was determined, that the words "as touching the disposition of my temporal estate," carried a fee. Those words he observes are merely descriptive of the particular estate or lands as to locality, but not as to the quantity of interest which the testator has in them. This opinion has been the subject of animadversion by some who have differed in opinion with this learned judge; but I believe, that when the whole case comes to be examined and understood, it will be found in unison with every decision that has taken place in England from that time to the present day. In the case of *Denn vs. Gaskins*, (Cowper 660,) and *Right vs. Sidebotham*, (Doug. 761,) Lord Mansfield said, "if the testator had in any way connected the introductory part with the devise in question, it might have done. But as there was no connection the devisee could only take a life estate." In the case of *Doe ad. Wright*, (8 D. & E. 67,) Lord Kenyon, speaking of the case of *Ibbetson vs. Beckwith*, (Talbot's cases 157,) where some stress was laid on the introductory words, says "it is not clearly settled, that those words are not of themselves sufficient to carry a fee." (*Doe dem. Spearing vs. Buckner*, (6 D. 612.)) Indeed they have now become as universal and as much a matter of form as the pious ejaculation usually introduced at the commencement of a will. And to give them the operation now contended for, would convert every devise of land into a fee simple when restrictive words are not used. But even that would be better than the principle now attempted to be established, of making it in all cases a question of intention, to be collected from all the parts of the will, without regard to any of the rules of construction heretofore established, by which the

intention is to be ascertained; because there would be something like certainty in such a decision, but the other would leave us without any rule. Every case would depend upon the capricious opinion of a court and jury and every person claiming under a will must pass through the ordeal of a court of justice to ascertain his rights.

It then becomes a question, whether we shall cut the *Gordian knot* at once, and say that *no words of perpetuity*, or other words evincive of the testator's intention shall be required to carry a fee?

It was said in a former argument, that this was a relict of feudal tyranny, originally founded on reasons which do not now exist, and that we ought no longer to suffer ourselves to be bound by the fetters of a barbarous age. That it is still maintained in England from motives of policy, peculiar to a country where the right of primogeniture is to be encouraged for the purpose of supporting the aristocratical features of the government. Yet, even there it is said the judges are deploring, that the law is so, and are resorting to every subtilty to fritter it away and to erect a more rational system on its ruins. Cases have been read from the American reports, in support of these arguments, and our own Court of Equity, it is said, has decided that every devise of land shall be construed into a fee where no negative or restrictive words are used.

If this was an antiquated doctrine of the feudal system, which was now for the first time, attempted to be resuscitated, I might not, perhaps, be disposed to make it a part of our code. But it is one, not only coeval with the first rudiments of the Common Law, but it is one which has passed down through successive generations, unimpaired by the vicissitudes of time, and recognized by a series of modern decisions, until there is no principle of law better established. Even the regret which learned judges have expressed, that the law is so, while they continue to be governed by it, furnishes proof conclusive, that it is too firmly established to be shaken.

If we are to be influenced by motives of policy, we can-

not be more inclined to support wills in this country than in England. Our law requires an equal distribution of property. And public policy requires that every facility should be given to its operation. No argument therefore, unfavourable to the principle which I am contending for, can be drawn from that source.

Among the American cases, there are indeed some respectable opinions in favour of disregarding the English decisions. But I believe that ultimately, most of them have agreed to adhere to them. Among those, are the respectable states of New-York, Pennsylvania and Virginia. (*a.*) In New-York, they have been uniform. In Pennsylvania and Virginia, there appear to have been some conflicting decisions. But at length, they have come back to the old rule. In Maryland, there is one very old case to the contrary. But whether it would now be considered authority, even in that state, perhaps is questionable.

It is satisfactory to observe an abatement of that spirit of innovation, which, at one time appeared to be springing up in some of the states, and that those which seemed inclined to declare themselves "independent of the English decisions," have since returned to established principles.

The cases from our Equity reports, are entitled to great respect. And it is very desirable, that the decisions of the two Courts should be uniform. But on an abstract question of law, if it is not more peculiarly the province of this Court to settle the construction, it at least cannot be our duty to yield a point which we think already settled. But I do not consider the question yet settled in the Court of Equity. The Judges of that Court were divided in opinion, and I have little doubt that they will finally adopt the decisions of this Court as the correct rule. The well known regard which the distinguished members of that Court, who concurred in that opinion, have, for the settled rules of the Common Law, forbid us to believe

that they will, upon a review of that decision, leave afloat a doctrine so well established.

If, therefore, we are to be governed by authority, if we are to regard, as sacred, those principles of law which have prevailed from immemorial time, the nonsuit in this case must be set aside. The language of Lord *Kenyon*, in the case of *Doe vs. Wright*, (8 D. & E. 67,) is equally applicable in this Court, as in that, over which he presided, "certain rules, he says, have been adopted, by which the real property of this country has been governed for ages, and it would be too much for us now to upset them. We should be removing landmarks, if we were to abandon that which has been adopted as a rule of property, in pursuit of a doubtful intention of a testator."

If it be asked why words of perpetuity should be required, I would answer, by asking again, why are they required in a grant or deed? Why is a seal considered as adding solemnity to a contract? Why are devises of real estate required to be executed with more solemnity than wills of personal property? Why should the personal property, belonging to the wife, before marriage, become the absolute property of the husband, while he has only an usufructuary interest in her lands? What reason can be given for all these things, except that "*ita lex scripta est.*" Even the right of primogeniture prevailed in this state until the year 1791. Yet, as unjust and uncongenial as it was, to all our political institutions, no judge undertook to say the law should not be so, until it was altered by the legislature. It does not belong to this Court to legislate. If the law is unwise or unjust, the remedy belongs elsewhere. Decisions of Courts, which go to unsettle long established principles of law, always operate retrospectively, and produce effects which cannot be guarded against by any degree of vigilance or foresight. Acts of the legislature are prospective in their operation. They are promulgated and known, and every person has it in his power to conform to them. *The certainty of the law is*

the security of the citizen. That security is destroyed and confidence impaired by the oscillating decisions of Courts.

It has often been remarked, that *it is not always so important what the law is, as that it should be known and uniform.* And if any rule of law has been universally acknowledged in this state, until lately questioned in the Court of Equity, it is that now under consideration. And this appears to be an attempt to effect through the instrumentality of the Courts, what the legislature has refused to do. But I am glad that the attempt has not succeeded. I believe there may have been instances where the judges of this state have heretofore gone as far as we are now called upon to go in innovating on the Common Law. But I have scarcely known an instance where some inconvenience has not resulted from it. One such decision intails upon us embarrassments from which twenty years practice cannot relieve us.

I am of opinion, that the nonsuit ought to be set aside.

Justices *Johnson* and *Huger*, concurred.

Justices *Colcock*, *Gantt* and *Richardson*, dissented.

Nott & M'Cord, for the motion.

Blanding & Starke, contra.

(a.)—N. York, *Jackson vs. Embler*, (14 John. 199.) Penns. *Clayton vs. Clayton*, (3 Bin. 476.) Virginia, *Moberry et al. vs. Marye*, (1 Munf. 453.)

As to connecting the introductory and devising clauses, see the cases cited in note (a.) Also *Goodright vs. Stocker*, (5 Term Reports 13.) *Den dem. Moore vs. Mellor*, affirmed the House of Lords, (2 B. & P. 253, S. C. 1 B. & P. 561.) *Doe vs. Allen*, (8 T. R. 503.) *Frogmorton vs. Wright*, (2 Wm. Black. R. 891.) *Loveacres vs. Blight*, (1 Cowp. 356.) *Goodright ex dem. Drewry vs. Barron*, (11 East, 220.) *Doe vs. Child, et al.* (1 N. R. 344, (*Doe vs. Clarke*, (2 New Rep. 348. *Jackson vs. Harris*, (8 John. 145.) *Jackson vs. Bull*, (10 John. 149. *Jackson vs. Wells*, (9 John. 222.) *Jackson vs. Balcock*, (12 John. 391.)

R.

AGNESS COLLINS vs. ROBERT D. MONTGOMERY.

The sheriff cannot sell personal property until it has been reduced into possession.

Where a negro had been levied upon by a former sheriff, who had not delivered him to his successor in office, who sells the negro, when he is not present, the sale is void.

THIS was an action of detinue, to recover a negro woman. Tried before Mr. Justice *Richardson* at ——— May Term, 1816.

The plaintiff sued as guardian of Thomas V. Collins, and upon the trial it was proved, that John Hogan purchased the negro at sheriff's sale and conveyed her to plaintiff.

The negro was not present at this sale, but had been levied upon by the former sheriff, who had not delivered her to his successor.

The same negro, being afterwards taken, was again sold by the sheriff; at which sale the defendant became the purchaser. He was notified of the rights of the plaintiff, and James Collins, the father, brought an action of trover which was pending when James Collins died, and the suit abated; soon after, the present plaintiff brought detinue, but was unable to prove, that Montgomery, the defendant, had the negro in possession at the time of bringing the suit, and it appeared, that the negro was now in possession of another person, and had been since some time in 1816.

Upon this evidence, the Presiding Judge ordered a nonsuit, on the ground, that in detinue there must be proof of possession of the property by the defendant, at the time of bringing the suit, or at the time of demand made.

The plaintiff appealed from this order.

1st. Because the evidence ought to have gone to the Jury on the question of possession.

2d. Because, in detinue, it is not necessary that there should be actual possession at the time of bringing the suit; it is enough, that defendant has had possession, and he cannot defeat the right of the plaintiff by putting the

property out of his possession, with a knowledge of plaintiff's rights.

Mr. Justice *Richardson* delivered the opinion of the Court.

Upon the specific grounds taken in the brief, there is some difference of opinion ; and the court has come to no absolute conclusion. But the nonsuit is unanimously supported upon the position taken by the defendant's counsel, that the sheriff could not sell personal property, unless before reduced to his actual possession ; and therefore the sale to *J. Hogan*, was void, and so the plaintiff had no title to the negro.

The levy under an execution, presupposes actual contact with, and taking possession of, the thing levied upon. The sheriff is bound to make some general estimate of the value of it. He must not be extravagant. To take two oxen for a penny, would subject him to an action. (See *Venditioni Exp. capias* and *Fi. Fa. Jacob's Law Dict.* 11 *Viner*, 12. 3 *Black.* 417.) His discretionary power, being very great, is a very great reason why he must not be authorized to abuse so high a trust.

He must not on the contrary take too little, when it is in his power to take enough, lest the opportunity should not recur, and the plaintiff lose his claims. The levy too is payment *prima facie*, and the thing levied on must be resigned or disposed of before further satisfaction can be had. How abundantly necessary then, that the sheriff should not only see and examine the property, but actually keep it.

If the sheriff is not obliged to exhibit the article he offers for sale, fraud, collusion, and uncertainty would too easily follow.

A farmer on the high way, going to market, might have his team, waggon and the contents, all levied upon, without knowing that the man whom he had fallen in with for a moment was a sheriff. He might proceed to town, sell his flour, and then he and the purchaser discover that

the sheriff had already disposed of the whole, under his hammer. A planter who had actually provided cash to pay the sheriff whenever he should call to make a levy, might have every negro and implement of his plantation claimed under the sheriff's bill of sale, while he was yet wondering why that officer had not called to receive the money due.

The collusion between the sheriff and either party might be endless; for instance, with the plaintiff, to purchase the defendant's property for a trifle, which could be easily done when he was ignorant of the sale, and his property absent: or on the other hand, by a deceitful compact with the defendant, that he might have it purchased in, upon his own terms, to the injury of his creditor. And what uncertainty too, as to the property, would follow afterwards. Why are these sales required to be made before the public? Simply, that every one may bid, and every bidder see for what he bids. But let the property be absent, and the end is lost. If the sheriff do not both hold possession, at least command the possession before, and exhibit the article at the sale, who can tell for what he bids, or afterwards know what he has purchased. For example, a bay horse is sold, but whether the bay coach horse or the bay riding horse of defendant, or his bay, turned out to pasture, as antiquated and useless, who can tell? Negro Jenny is sold, but whether Jenny the cook, Jenny the child, or Jenny the grand mother, the sheriff himself could not tell, unless accidentally acquainted with all the Jennys?

Again, the custom (ever to be regarded,) has been immemorially to exhibit at those sales, as at auctions generally, the property to be sold, except lands. But lands may be always examined beforehand by every one, and cannot be hidden from the previous view of the bidder; and therefore need not, as of necessity they cannot, be adduced at the sale.

This custom is well enforced by the rule of this Court, which requires, that sheriff's sales shall be at the court houses, except in a few instances, wherein it would be in-

convenient to remove the property, as furniture, &c. but in these, the sheriff is required to go to the place where the things are kept and shall so sell them.

I conclude then that this is an explicit instance that "*via trita, est via tuta*;" and that should we leave the beaten track, we may go wide astray, and not more from the usage than from safety, certainty and justice.

The motion is therefore dismissed.

Justices *Colcock*, *Nott* and *Huger*, concurred.

Mr. Justice *Johnson*,

I concur in the result of this opinion, that the levy by the predecessor of the sheriff, who sold, did not give him the right to sell, unless the negro had been turned over to him with the execution, and reserve the question, whether circumstances may not justify a sheriff in selling, although the property is not present.

Miller, for the motion.

De Saussure, contra.



THE ADMINISTRATORS OF G. NORWOOD *ads.* MARK MANNING.

Interest is recoverable on judgments.

Where a payment is made, it goes in the first place to the extinguishment of the interest.

Though the whole amount appearing on the face of a judgment be paid, yet it must be deducted from the aggregate amount of principal and interest: And the balance is principal.

DEBT on judgment, tried before Mr. Justice *Gantt*, at Sumter, Spring Term, 1820.

This was an action of debt, brought on a judgment recovered against defendant's intestate, in his lifetime. After the verdict on which this judgment had been entered up, was first obtained, the defendant appealed to the constitutional court for a new trial, where the case was sus-

pended for two or three years. The plaintiff nevertheless entered up his judgment, and when the motion was dismissed in the constitutional court, issued an execution which was lodged in the sheriff's hands, but never had been proceeded on. Whilst the proceedings were in that state, the defendant died, and administration was granted to the present defendant. The plaintiff then commenced an action of debt on the judgment; to which the defendant pleaded in bar, that the plaintiff had taken out an execution on the judgment, which execution was still of full force. To that plea the plaintiff demurred, and the Presiding Judge sustained the demurrer. The case was then referred to the clerk to assess the damages in the nature of a writ of enquiry. Between the time of entering up the judgment and the commencement of this action, several payments had been made. The clerk calculated the interest on the judgment up to the time of the first payment, and then deducted the payment from the aggregate amount of principal and interest, and then calculated interest on the balance, up to the next payment, and so on, and assessed the damages to the amount which appeared to be due according to that mode of calculation. The Presiding Judge set aside the assessment, and directed the clerk to deduct all the payments from the original judgment, and to calculate the interest on the balance only. The defendant's counsel now moved to reverse the decision of the court, which supported the demurrer, and the plaintiffs counsel moved to reverse that part relating to the method of assessing the damages.

Mr. Justice *Nott* delivered the opinion of the Court.

This case has been submitted without argument; and I am therefore at some loss to conjecture upon what ground the defendant's counsel expected to support his motion. That an action of debt can be brought on a judgment, there can be no doubt. And I am not aware, that merely lodging an execution in the sheriff's office can be a bar to that action. That motion therefore must be dismissed.

The question, arising on the second ground, appears to me to have been settled by former decisions of this court. In the case of *Lambkin vs. Nance*, decided in this court in the year, 1806, it was held, that interest might be recovered on a judgment. In the case of *Hamilton vs. Fiddy*, tried in Charleston in the year, 1809, it was determined, that the plaintiff might recover interest on a judgment, the whole amount of which, except the interest had been paid and accepted before trial. In the case of the *Exors. of Snipes vs. Sanders*, (1 Nott & M'Cord 242,) several payments had been made and the balance offered to be paid though not actually tendered before action brought. The balance however was paid into court together with the costs; yet the court held, that the plaintiff was entitled to interest.

It is a mistaken view of the subject, to suppose, that when a payment is made, it goes in extinguishment of the principal. The rule has always been with us to apply it to the extinguishment of interest first; and therefore though the whole amount appearing on the face of a judgment be paid, yet it must be deducted from the aggregate amount of principal and interest, and the balance is principal; and that has been the mode of calculation long established in this state.

The last motion therefore must be granted and let the calculation be made according to the method first adopted by the clerk.

Justices *Johnson* and *Huger* concurred.

Mr. Justice *Colcock*:

I dissent to this opinion as it relates to the assessment. The interest is recoverable but does not follow the judgment as a matter of course; and therefore the payments before the recovery of interest, must be applied to the original judgment.

Mayrant, for the motion.

Blanding, contra.

EZEKIEL MAYHEW, Administrator of THOMAS WHITE
vs. SARAH FLAKE.

Where an administrator commences an action for a demand due his intestate, the defendant may plead a discount.

TRIED before Mr. Justice *Colcock*, at Kershaw, Spring Term, 1820.

This was an action to recover a note of hand for \$ —, and the sum of three hundred dollars due by defendant, to plaintiff's intestate, for overseer's wages.

The defendant pleaded a discount for certain articles furnished, which was rejected, because by permitting a defendant to plead in discount to any action by an administrator, a preference might be obtained by one creditor over another, and debts of an inferior grade might be paid before those of a superior, contrary to the provisions of the act of 1789, commonly called the executor's law: A verdict was found for the plaintiff, from which the defendant appealed, on the ground, that the discount should have been admitted.

Mr. Justice *Colcock* delivered the opinion of the Court.

The act of 1789, I have always thought, controled the discount act in this particular. It is no difficult matter for the representative of an estate, to give a preference to one creditor, if this be allowed, for suppose, that creditor sued by the administrator, and upon filing his discount, he obtain a verdict for a large amount, and enforce it, the whole estate may be taken from the other creditors. But it is conceived, that there are ample remedies for this and every other inconvenience, which may arise by pursuing the authority of the discount act; and my brethren are unanimously of opinion, that the discount in this case should have been allowed. They think the representative should reply *plene administravit* to the discount when it exceeds the debt as to the surplus, and that the court will grant him time to make out his accounts, and marshal the assets of the estate; and that a creditor who would attempt

to enforce his judgment might be restrained by the court of equity, and thus the inconveniences apprehended be provided against.

The motion is granted.

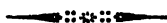
Justices *Johnson*, *Huger*, *Gantt*, and *Richardson*, concurred.

Mr. Justice *Nott* :

I concur in this opinion, except as to allowing the administrator in such case to plead *plene administravit*, respecting which, I give no opinion.

Levy & M'Willie, for the motion.

Carter, contra.



R. CUNNINGHAM, Admor. of D. S. BAILEY, vs. JOHN BAKER.

Where an administrator commences an action within the nine months allowed him by law, the defendant may plead a discount.

TRIED before Mr. Justice *Richardson*, at Lancaster, Spring Term, 1820.

This was a *Sum. Pro.* in which the discount was offered within nine months during which the administrator is protected from suit by the act of 1789.

The Presiding Judge thought the discount, operating in the nature of an action, could not be pleaded within the time.

The plaintiff had a decree from which the defendant appealed, on the ground, that the discount was admissible.

Mr. Justice *Colcock* delivered the opinion of the Court.

My brethren are of opinion, that if the administrator thinks proper to sue within the time, the discount must be

allowed, for it is to be considered more as a payment than a demand of a debt.

The motion is granted.

Justices *Nott*, *Johnson*, *Huger*, and *Gantt*, concurred.

Mr. Justice *Richardson* dissented.

Miller, for the motion.

Rogers, contra.

PATRICK DUNCAN vs. DAVID BEARD, Administrator.

A grant of an uninhabited portion of country by a British governor, to A. and his *associates*, is not void for uncertainty.

If a deed be certain in part, and uncertain in other parts, it is not therefore void. Such construction shall be given *ut res magis valeat quam perat*.

Where a grant has once passed the great seal, it cannot be revoked, except by legal proceedings; even if the sovereign power should possess the power of itself of determining when a grant should be revoked, a second grant for the same land would not be considered evidence of revocation.

Where a deed is made to A. his associates, and A. makes a deed of the land, a deed from the associates will also be *presumed*, (if necessary) after a great lapse of time, and possession under A. A deed thirty years old, may be given in evidence without proof of its execution, if accompanied with possession. (*Quere*, as to a Will.)

Papers, other than deeds, if found in the place in which they should be deposited, in pursuance of their object, that circumstance, added to their being thirty years old, will raise a presumption in favor of their authenticity; and when they are produced from their proper repository, and have been properly preserved, it will not, after a certain time be necessary to prove them.

Where the subscribing witnesses to a will are dead, and no proof of their hand writing can be obtained, it will be sufficient to prove the handwriting of the testator.

Where a witness called to prove the handwriting of a subscribing witness to a codicil, could not undertake to say that he had ever seen the subscribing witness write, but that from his having been a notary public, he had seen much of his acknowledged writing, it was held sufficient.

Where a man devised lands to his daughters, (in 1782,) who were

aliens they are entitled to take by descent, being protected in their rights by the treaty of 1792, 9th Art. which declares that British subjects shall hold as before the war.

Whether persons hold possession of land, as the tenants of another, is a question for the Jury.

TRESPASS to try Title, tried before Mr. Justice Colcock, at Abbeville court house, Spring Term, 1819.

Adam M'Kee, claimed to be the real defendant, and was entered as such on the record.

Plaintiff's title—1st. A grant to *William Levingston*, and his associates, dated 27th June, 1752, for 50,000 acres, tract No. 3, by *James Glenn*, governor of the then province.

2d. Lease and release from *William Levingston* to *John Hamilton*, dated 25th and 26th June, 1753, for 200,000 acres, including tract No. 3.

Richard A. Rapley, a witness, sworn, proved *Le Briton's* hand writing, who was one of the subscribing witnesses to this conveyance, but did not know *Barnard*, the other witness to the deed; both of them lived in England, and were dead, as witness understood before he left it. Memorandum on the deed, that it was proven before *Thomas Rawlinson*, Mayor of London, the 11th May, 1754, by *James Bernard*. Witness *Rapley* came here in 1770 or 1771, as the agent of *Salvadore*, in 1772 or 1773. He resurveyed the land, and took possession, suing those who held out, and leasing to others. Only two held out. He had all the papers relating to the title, and this deed and grant produced now among them. The grants had seals to them at the time he had them, both for No. 3 and 4. They were broken by being carried about, and he believes he cut off the remains of them. He continued in possession until 1784 or 1785, when *Salvadore* came in, and he removed away to the lower country, but returned again.

3d. Lease and release from *John Hamilton* to *Joseph Salvadore*, dated 27th and 28th November, 1755, for

100,000 acres, No. 3 and 4. *Rapley* has often seen *Hamilton's* hand writing, but did not know him. Knows his writing from a correspondence; has heard that *James Grindlay*, one of the witnesses, was dead before he left England—knows nothing of *John Jackson*, the other witness. Retorded in Charleston, 28th April, 1766, by *Fenwick Bull*, register. *Rapley* knows *F. Bull's* writing—has often seen him write. *Salvadore* died about 1786 or 1787. He had a house at ———, in which he lived.

4th. Will of *Joseph Salvadore*, dated the 7th October, 1782. *Rapley* knows the hand and seal of the testator, but does not know the writing of either of the witnesses.

5th. Power of Attorney for the heirs of *Salvadore* to *James Nicholson*. *Rapley* knows the hand writing of *Moses Salvadore*, one of the subscribing witnesses, and also of *Patrick Duncan*, another subscribing witness. He knows the writing of *Abigail* and *Elizabeth Salvadore*, but does not know that of *Texiera and his wife*, nor of *F. A. Holland*, notary public, another witness.

6th. Decree and proceedings in the Court of Equity, by *Robert E. Griffin vs. Nicholson*.—Report confirmed—Land Sold—Sale confirmed.

7th. Deed from the Commissioner in Equity to *Patrick Duncan*. *Francis Wardlaw*, witness, saw it executed—other witnesses who signed it with him, out of the state. Dated 8th July, 1816. For No. 3 and 4, \$13,682.

The *locus in quo*, established by squire *Morrau*, and that defendant lived within the lines of No. 3.

Jesse Calvert, proved that the defendant was in possession of the land when he went away, five or six acres.

On the part of defendant:

A grant to *John Dixon*, for 1000 acres, dated June, 1803.

Deed from *John Dixon* to *Adam M'Kee*, dated 15th October, 1805. *John Steal* proved the execution of it, and that *Michael M'Kee*, the other witness who signed it at

the same time with him, is in the western country. He also stated, that he knew *Adam M'Kee*, the real defendant, to be in possession from the year 1803; that is by him, (the witness,) as a tenant. He went in under a written instrument; but of this instrument, he could give no account. Mr. *Morrow*, proved that the defendant's grant covers the land in dispute, and that he had understood, that *David Beard*, the nominal defendant, was a tenant of *M'Kee*.

John M'Kee says, that *David Beard* was a tenant of his brother *Adam*. He understood it from both of them—he stated, that after *Steal* went out of possession, *Beard* worked it one year. Then one *With*, for the next year. Then one *Spencer*, and then the widow *Melford*, and she has remained in possession ever since. On his cross examination, he could not fix the order in which these persons succeeded each other, but stated that the land had been always occupied by some one under the authority of his brother.

Robert Breckenridge was called, but had forgotten or never knew any thing about the possession.

In reply, Mr. *Bowie* stated, that he went into possession as a tenant of *Salvadore*, in 1772 or 1773—has paid rent for it to all the claimants, and still holds it—considers himself a tenant to whoever is the owner. He first paid rent to *Rapley*, as agent of *Salvadore*—afterwards to *Salvadore* himself—then to Mr. *Wm. Tennant*, as agent of the *Philadelphia Company*—his lease was for the residue of what had not been leased before. In the year 1774, he ran round the whole of the land, (4 tracts,) for *Salvadore*, at the request of *Rapley*, as his agent.

Mr. *Rapley* further proved, that he is in possession of about 100 acres of No. 3—has cultivated it for 20 or 25 years—he leased to Mr. *Bowie* as the agent of *Salvadore*.

The Jury found a verdict for the plaintiff—and a motion was now made to set aside the verdict, and for a new trial on the following grounds:

1st.. Because the Court ought to have rejected the grant to Wm. Levingston and his *associates*, as void for uncertainty, and forfeited for non-performance of the condition.

2d. Because the Court permitted the conveyance from *Wm. Levingston* to *John Hamilton*, to be given in evidence without requiring the plaintiff to show a transfer of the right of his *associates*.

3d. Because there was not sufficient proof of the will of *Joseph Salvadore*, no account having been given of the subscribing witness, and not sufficient proof of the codicil, there being no proof of the hand writing of one of the witnesses.

4th. Because the proceedings in the Court of Equity ought to have been rejected for irregularity.

5th.—Because the heirs of *Salvadore* were bound to take by descent, and not by devise; and being aliens, no descent could be cast upon them.

6th.—Because the power of attorney was insufficiently proven, in as much as there should have been some account given of the third subscribing witness, and proof of the hand writing of two of the parties, *Susannah* and her husband.

7th.—Because the verdict of the jury was contrary to law, and the Judge's charge upon the statute of limitations.

8th.—Because the verdict was contrary to law and evidence, in as much as the defendant proved a title by possession.

Mr. Justice *Colcock* delivered the opinion of the Court.

The first ground presents two points for determination: First, whether the grant to *William Levingston* and his *associates* is void for uncertainty? and secondly, whether it is forfeited for nonperformance of the condition? As to the first point there can be no doubt, as has been argued, that a deed may be void for uncertainty; but if a deed be in part certain, and in other part uncertain, it does not follow, that it is void; for the rule is, that such construction shall be given if possible *ut res magis valeat*.

quam pereat. Now as to *Livingston*, the deed is certain. It is to him; and our not being able to identify his *associates* does not render the deed void. The word has no technical meaning, but it bears a strong analogy in common parlance to the word assigns. And when we read the deed through, and see, that the object was to settle an uninhabited portion of country with a certain description of persons, it is easy to discover, that it was intended by the grantor to vest the whole of the legal estate in *Livingston*, with authority to him to regrant or convey any part thereof to such persons as would *associate* with him in the undertaking to settle the land; and this view of the subject is supported by the deed which he afterwards makes to *Hamilton*, in which he styles him his *associate*. But if there had been persons *in esse* at the time, who were denominated his *associates*, who *might* then have taken under the grant, after a lapse of sixty years and an accompanying possession by those to whom *Hamilton* sold, a deed from the associates to *Livingston*, might be fairly presumed.

Upon the second point, in this ground, the plaintiff's counsel contended, that the condition, being subsequent, it will be presumed to have been performed; and that if not, the grant must be set aside by a regular process of law. To which it was replied, that the grant reserved to the grantor the right of re-entry, on the failure to perform the condition, and that the subsequent grant may be considered as evidence of that re-entry, and the failure to perform the condition. It is certain, that where a grant has once passed the great seal, it cannot be revoked except by some legal proceeding, and this for the most obvious reason. The party may have it in his power to show a compliance with the condition or a release from the performance of it, (*6 Comyn's Digest* 63, letter D. 70. 5 Com. 274, title patent.) Despotic indeed would be that government which should exercise the power of revoking at will, all grants of land which it may have made to individuals, or of determining without the intervention of a judicial tribunal, where there was ground for a revocation.

The usual mode in England is by *scire facias* in equity or by process on the law side of the exchequer court. But if it were consistent with the principles of justice, that the sovereign power should of itself determine when a grant should be revoked; a second grant of land in this state should not be evidence of such revocation, for they are often made without the knowledge of the officer who is empowered to sign the grant. It not unfrequently occurs that there are two or three grants for the same land, and the public officers perfectly ignorant of this fact. The younger grant in this case then cannot be considered as any evidence of the revocation of the elder, but that remains in full force.

The second ground has been determined in the consideration of the first. A deed from the *associates* if we can suppose them grantees would be presumed, after a lapse of so many years, and a possession under *Levingston*.

Upon the third ground, the insufficiency of the proof of the will, I take it to be a well established doctrine, that a deed of thirty years may be given in evidence without proof of its execution, if accompanied by possession, and a mere entry for the purpose of resurvey has been considered a sufficient possession. (*Reid vs. Eifert*, 1 *Nott & M'Cord* 374.) What are the reasons on which this rule is founded? 1st. That after a lapse of thirty years it is difficult, and in most cases impossible, to procure the witnesses to the deed. Those who are parties to a deed of thirty years standing, must be upwards of fifty years old, and a great portion of those who are born, die before that period. The second reason is, that a possession or an exercise of ownership, under the deed, is calculated to give authenticity to it. In my own opinion there is a possession under this will, for I consider the possession of Rapley (who obtained his possession as the agent of *Salvadore*) the possession of the devisees of *Salvadore*. He would not be permitted to set up an adverse title to them, and it is not necessary by the stat. of ———, that he should have attorned. But if this be not clear as is the

opinion of my brethren, still the first reason of the rule applies to the case of this will, and another rule, in regard to papers other than deeds, is, that if they be found in the place in which they should be deposited, in pursuance of their object, that, that circumstance, added to their being thirty years old, will raise a presumption in favor of their authenticity. (*Peake* 73. *Phillipps* 349.) And Mr. Justice *Buller* says "ancient writings which are proved to have been found among deeds of evidences of land, may be given in evidence, although the execution cannot be proved; for it is hard to prove ancient things and the finding of them in such a place is a presumption, that they were honestly and fairly obtained and preserved for use and are free from the suspicions of dishonesty." (*N. P.* 255.) And Mr. *Phillipps*, in pursuing the subject, observes, that "this observation on the necessity of showing where the deed was found, seems to apply more particularly to those cases, where the character and authenticity of old writings depend in some degree on the nature of the place or custody, in which they have been kept;" and when they are produced from their proper repository and have been properly preserved, it will not, after a certain time, be necessary to prove them. (*Phillipps* 350.) Now the will in this case was taken from the secretary's office, in Charleston, where by the law then existing, all wills are required to be deposited and is upon the face of it free from all suspicion of fraud, and appears to have been executed with all the formalities required by the statute. Again, in *Phillipps*, (385,) it is said, "where the subscribing witnesses are dead and no proof of their handwriting can be obtained, as must frequently happen in the case of old wills, it will be sufficient to prove the signature of the testator alone." And the case of *Calthorpe vs. Gough et al.* (4 T. R. 707,) is referred to, and although this point was not finally determined in the case, yet it is the expression of an opinion of a distinguished judge and supported by the authority of a case decided by Sir *Lloyd Kenyon*, master of the rolls. In this case the handwriting and

seal of the testator to the will were proven, and his handwriting to a codicil made in the year 1786, not long before his death, and proof of the handwriting of one of the subscribing witnesses to the codicil, by one who could not undertake to say he had ever seen him write, but from the subscribing witness' having been a notary public, he had seen much of what was acknowledged to be his writing.

But it was said, that there was no proof of the death of the subscribing witness; as to one, there was as much proof as is ever required. The witness, Mr. *Rapley*, says he has heard, that one of them was dead, and when it is recollected, that the will was executed thirty odd years ago, and in England, I think it a fair presumption, that the others are also dead.

The fourth ground requires no observation, for no argument is offered to show any irregularity in the proceedings, and none is apparent on the face of them.

The testator by his will devises his estate to his three daughters, in trust for his creditors.

The fifth ground therefore cannot avail the defendant, for the children of the testator, *Salvadore*, I am inclined to think, must take, subject to the trust or not at all. But if they were obliged to take by descent, their rights are protected by the 9th article of the treaty of 1794, which declares, that British subjects shall hold as before the war.

Upon the sixth ground, I am of opinion, that all the proof, which the law requires in such cases, was given. It was proven, that the plaintiffs had been authorized to act for the heirs of *Salvadore*, as attorney. But there was no necessity to prove any thing about the power of attorney, in this case; that might have been a question in the court of equity, when the proceedings were going on there against the heirs of *Salvadore*; we have nothing to do with the agency of the plaintiff—he claims before us in his own right of a deed from the plaintiff.

The two last grounds may be considered together—the Jury were instructed, that if they believed that the real defendant, Adam M'Kee, had been in the possession of

the land by his tenants, from the year, 1805, to the commencement of this action, they ought to find for the defendant. Or if they doubted whether these persons, who were said to have been in possession, were the tenants of M'Kee; yet, if they were satisfied, that there had been a continued and uninterrupted possession, though of different persons, not conveying to each other—for that time, that then they ought to find for the defendant; and this I directed on the authority of the case of *Mayrick vs. White*, decided in this Court about the year 1808 or 1809; it was an action brought by myself. The case never met approbation; but I considered myself bound by it. I am authorized to say by my brethren, that they do not consider the case as authority, having only a verbal report of it: The question then, whether these persons said to be in possession, were the tenants of M'Kee, was one merely of fact, and for the determination of the Jury. It was positively sworn to, so far as regarded the possession after the deed from Dixon to M'Kee. It was not clearly and satisfactorily proven as to all who occupied, that they were tenants. And I am not dissatisfied with the verdict. The Jury were acquainted with the witnesses, and all the circumstances attending that sort of possession, and were therefore better qualified to determine on the fact than the Court. Upon the whole, the objections to the plaintiff's title being overruled, and the Jury having found against the defendants, on the facts, the motion is discharged.

Justices *Nott*, *Johnson*, *Richardson* and *Huger*, concurred.

Noble, for the motion.

M'Duffie, contra.

The STATE *ads.* DAVID L. WAKELY.

Every Court acting clearly within its jurisdiction, in a case legally submitted, is independent of all others, to which no appeal is given. No prohibition lies to restrain the proceedings of a Court Martial for irregularities as long as it acts within its jurisdiction.

THIS was a prohibition, tried before Mr. Justice *Richardson*, at Chambers, who made the following decision : "It is admitted that *A. Hall*, is a private within the beat company of Captain *Wakely*. It is not denied in the oath verifying the suggestion that the Court Martial was legally constituted. But it is alleged that *A. Hall* was not summoned to attend one of the musters, and had a legal excuse for his absence at the other. It is not denied that *A. Hall* was summoned to attend the Court Martial, but it is alleged that the Court had no proof that he had been summoned to attend either the musters or the Court Martial ; and that execution has been issued to levy the fines, without the said *A. Hall* being previously required to pay the same."

"There may have been grounds for an appeal, but as the Court was legally constituted, and had jurisdiction of the subject in contestation ; and as *A. Hall* was summoned to attend the Court, and failed to offer any excuse for his absence, I cannot perceive any usurpation of jurisdiction, or such a want of testimony as would authorize the issuing of the writ of prohibition. *Every Court acting clearly within its jurisdiction, in a case legally submitted, is independent of all others, to which no appeal is given.* The motion for a prohibition is therefore dismissed."

The relator gave notice, that he would appeal from the decision in this case, and for a reversal thereof on the following grounds :

1st. That the Court Martial proceeded to give judgment against the said *Ainsley Hall*, without proof that he was in default in not attending the musters for which he was fined.

2d. That the Court gave judgment against the said

Ainsley, without proof of his being summoned to attend the Court Martial.

3d. That there was no charge exhibited against him before the Court Martial, of which he had any notice, and therefore any fine imposed by default was illegal.

Mr. Justice *Richardson*, delivered the opinion of the Court.

To answer these objections to the decision of the Judge, I have but to enquire, as in the case of *M'Donald & Bonner vs. Elfe*, (1 *Nott & M'Cord*, 504,) for what prohibition lies?

"The complaint should be that the party aggrieved has been drawn *ad aliud examen* by a jurisdiction usurped, or by a process disallowed by the laws," (see 2 *Inst.* 229, 607, 243. 2 *H. Black.* 100.) "The general ground," says the last authority, being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance." Lord *Loughborough* goes on to state, (in the same well considered case, *Grant vs. Sir Charles Gould*, in which the charge of irregularity was directly in question,) one other ground of prohibition "which is indeed" he continues, but a species of the other, to wit, that where the authority is limited by act, (meaning an authority which was before inherent in the Inferior Court,) the court which acted differently from the prescription of the act, exceeded its jurisdiction, and is therefore liable to prohibition. Beyond these two grounds (said the Judge) it does not occur to me that there is any other which can be stated, upon which the Courts of *Westminster Hall*, can interfere in the proceedings of other Courts, where the matter is within their jurisdiction." Coming directly to the charge of irregularity in the proceedings, he says, (p. 107,) "the most that can be made of it, is an error in the proceedings, but we cannot prohibit on that account.."

The doctrine then, is well settled, and to grant a prohibition in this case, would be to exercise appellate power.

ers, and to review the proceedings. But that we cannot do.

The relator does not deny that he was cited to attend the court; but he did not appear, and judgment passed by default. What evidence was adduced to show, that he had been summoned to turn out at the musters, and had failed to do so, does not appear. If insufficient, that would be matter of appeal, and not a ground for prohibition. If notice of the precise charge against the relator was not given, that too would be merely a ground of appeal, but such irregularity, though it may be good cause to review, cannot place the case out of the jurisdiction of the militia court. Wherever the party is aggrieved, he has an appeal to the officers of the regiment, after notice of the fine imposed. (*Mil. M. L.* 44, *Sec.* 130.) And unless there be an appeal, a subsequent act, (*Miller*, 54, *Sec.* 179) makes the sentence in express terms, "*final and conclusive, when approved*" by the officer ordering the Court. So that the statute conspires with the general doctrine to prevent this court from interfering.

The motion is therefore dismissed.

Justices Colcock, Nott, Gantt and Johnson, concurred.

Blanding, for relator.

Butler, for defendant.



THE STATE vs. DAVID L. WAKELY.

The captains of militia companies, for defaults of attendance at petty musters, are authorized by law to hold courts martial, without any order from any of the field officers of the regiment.

The captain, ordering the court martial, may preside as president; and is the one to approve of the sentence of the court.

A militia man is not allowed to send a substitute.

Under the act of 1808 (enacting that "every private who shall wilfully neglect to turn out at any ordinary muster, shall be fined the sum of one dollar and fifty cents, and fifty per cent. on the amount of his general tax) a sentence in these words and figures, viz. "§ 1 50 and 50 per cent." is sufficiently definite.

Every court, acting clearly within its jurisdiction, in a case legally submitted, is independent of all other courts, to which no appeal is given.

PROHIBITION ordered by his Honor Mr. Justice *Nott*, at Columbia; motion to reverse the order of his Honor and set aside the Writ of Prohibition.

In this case it appeared, that *David L. Wakely* was captain of a militia beat company; that for a default of *Ainsley Hall*, a private, in said company, in attending company muster, the said *Ainsley Hall* was summoned before a court martial to answer for such default. That captain *Wakely* presided, and two of the lieutenants of his company, were the members of the same; that upon the trial of the said *Ainsley Hall*, he was fined for said default, and an execution issued, by the said captain *Wakely*, to enforce the collection of the said fine.

His Honor Mr. Justice *Nott* granted a Writ of Prohibition, to restrain proceedings on the said execution, on the grounds:

1st.—That the said *David L. Wakely* and the other members of the court martial were never authorized to hold said court by any order issued by any of the field officers of the regiment to which he was attached, or any other officer having authority to make such order.

2d.—Because the said court martial exceeded its jurisdiction, or acted without any jurisdiction.

The defendant moved, that the said order of his Honor be reversed, and that the Writ of Prohibition be set aside, on the grounds:

1st.—That the captains of companies for defaults of attendance at petty musters are authorized by law to hold courts martial and preside as presidents of such courts, together with their subaltern officers as members of such courts in their respective companies, without any order from any superior officer of the regiments to which they may be attached, and may enforce the sentence of their respective courts, without the same being approved of by any superior officer.

2d.—Because the court martial that tried *Ainsley Hall* was constituted according to law, and had jurisdiction of his case, and tried the same fairly and according to law, and had a right to enforce the sentence of the court without submitting it to the approval of any other officer.

3d.—Because the order for a Writ of Prohibition is not founded in law, and ought to be reversed, and the writ set aside.

The opinion of the Court was delivered by Mr. Justice *Richardson*.

The grounds suggested for a writ of prohibition are,

1st.—That the captain of a militia company cannot order a court martial.

2d.—That the sentence of the court must be approved by some officer ordering the court.

3d.—That a militia man has a right to send a substitute.

This court is of opinion, that none of these grounds are tenable.

As to the 1st. the act directs simply "that &c. privates be tried by not less than three commissioned officers;" (*Miller's Mil. Law, Sec. 57,*) but by whom the court shall be ordered, is not expressly pointed out. In order that the statute may avail, we must conclude, that the court is to be ordered by the officer commanding at the time when the default occurred; that is to say, the captain, in this case.

This construction also points out who is to approve of the sentence. The injunction (*Miller's M. L. Sec. 57,*) is, that it shall be done by the officer ordering the court. In the instance before us, the captain in adjudging the fine, together with the rest of the court, and by his execution, of course, approved.

Upon the third ground, it is enough to say, that there is no law authorizing a militia man to send a substitute; and though in general, but a reasonable indulgence, yet it is too disadvantageous to military discipline and improve-

ment, to admit it as a general privilege, unless expressly given.

It was noticed, that the sentence being in these words and figures, to wit: "§ 1 50, and 50 per cent." was indefinite: But the statute (*See Miller 42 Sec. 124,*) fixes the fine at § 1 50, and 50 per cent. on the general tax of the defaulter, which render the sentence intelligible.

After the other case of the *State vs. D. L. Wakely*, just now decided, and several others lately adjudged, in cases of patrol fines, militia fines, and upon proceedings by justices and freeholders between landlord and tenant, I will not repeat the doctrine of prohibition further than to repeat, that *every court, acting clearly within its jurisdiction, in a case legally submitted, is independent of all other courts, to which no appeal is given.* Mere irregularity, insufficiency of proof, and mistaken judgments, in such cases, generally, afford matter of appeal only. But should we under the name of prohibition, entertain appeals not expressly given to us, this court would take jurisdiction and might review all cases from inferior courts.

The motion to reverse the order is therefore granted.

Justices *Gantt* and *Colcock* concurred.

Blanding, for the motion.

Lévy, contra.



MARTHA MATHEWS vs. JOSEPH WEST.

The Court will not be disposed to interfere with the finding of a Jury and grant a new trial on the ground of high damages, where a wanton and aggravated trespass has been committed on the property of a plaintiff.

A new trial will not be granted on the ground, that a party was deprived of certain title papers by high waters.

THIS was an action to recover damages for a Trespass committed with force in taking and carrying away *a load of Peaches* from off the land of plaintiff, of which she was in

peaceable undisturbed possession, and from the Judges report, (Mr. Justice *Nott*, who tried the case,) had been so for the space of thirty years.

Verdict for plaintiff, with \$ 200 damages.

The defendant moved for a new trial, on the grounds :

1st. Because the damages were excessive.

2d. Because he was deprived of certain title papers, on account of high water.

Mr. Justice *Gantt* delivered the opinion of the Court.

In answer to the first ground, it is to be remarked, that the Presiding Judge reports the trespass to have been wanton and aggravated, by the circumstance of its having been committed in despite of the feelings of the plaintiff, immediately *under her nose*, and in opposition to her authority. In a complicated injury of this kind, the rule adopted by the Jury, in estimating the damages, is not only correct and legal, but redounds much to their credit, as it evinces a feeling on the part of the Jury, friendly to the good order and well being of society, and hostile to acts of violence and force, which is the bane of it. On this ground, therefore, the Court entertain the opinion that the damages given, are by no means to be considered as excessive.

The second ground taken for a new trial, viz : that on account of high water, the defendant was deprived of certain title papers, is a circumstance which cannot counter-vail the force and effect of a verdict, which appears to have been very justly rendered.

The motion for a new trial, must fail generally.

Justices *Colcock*, *Nott*, *Johnson* and *Richardson*, concurred.

Caldwell, for the motion.

Stark, contra.

RICHARD RICHARDSON, *et al.* vs. ED. BROUGHTON.

Where a person goes into the possession of land, under a conditional agreement to purchase it, he cannot hold adversely to the claim of the person under whom he went into possession, so as to acquire a title by the statute of limitations.

Where a person claims land under a sheriff's sale, the judgment and execution, under which the land was sold, must be adduced.—(a.)

TRIED at Sumter, Spring Term, 1820, before Mr. Justice Colcock.

This was an action of Trespass, to try title to a tract of 100 acres of land.

On the part of the plaintiff, was produced :

1st. A grant to *Robert Murphy*, dated 29th October, 1776, for one hundred acres.

2d. A deed from the grantee to *William Dukes*, in 1780.

3d. A deed from *Dukes* and wife, to *R. Richardson*, dated 4th October, 1810.

It appeared that *Dukes* was in possession before the year 1792. That after him, *William Canty* and his wife, came into possession. *Canty* died, and wife continued in possession, except for a short time, during which she was married to *John Bradley*. She returned to the land, and they lived on it, until about six or eight years ago, when they left it, and removed from this country. About the year 1790 or 1791, Mrs. *Canty* bought the land of *William Dukes*, her brother, and gave him a negro. The purchase was conditional, but she went into possession and remained in it without any written title from *Dukes*. In 1810, she sold the land to Col. *Richardson*, the father of the plaintiffs, and wrote a letter (which was produced) to *Dukes*, requesting him to make titles to *Richardson*, as she was satisfied for the land. There was also produced, a receipt, by Mrs. *Bradley* and her husband, to Col. *Richardson*, for three hundred and sixty dollars, in full for this land. This receipt was witnessed by the defendant, and Mr. *Mathew James* proved the hand writing:

He said the *W* was not such as he now made, but that he was satisfied from the rest of the characters that it was his writing.

On the part of the defendant, was produced a receipt of *John Conyers*, sheriff of the district, for fifty-five dollars, dated 3d October, 1808, and a title from *Hartwell Macon*, the successor in office of *John Conyers*, for one hundred acres of land, dated 11th October, 1815. These papers were proved by *Macon*, who said he knew nothing of the transaction, but from the receipt, and that *Bradley* remained in possession after the sheriff's sale, to the time of his leaving the state. No judgment and execution were produced.

The Jury were instructed to find a verdict for the plaintiff, which they did, and a motion was now made for a new trial, on several grounds, which are reducible to this: That the Court misdirected the Jury, in as much as the long possession vested a title in *Bradley*, and the sale by the sheriff was good.

Mr. Justice *Colcock* delivered the opinion of the Court.

The plaintiff's title was complete; but it was objected, that *Dukes* could not convey, inasmuch as *Bradley* and wife, by their long possession, had acquired a title. Mrs. *Bradley* went in under a conditional agreement to purchase, she would not therefore be permitted to claim adversely to *Dukes*. But neither she nor her husband have pretended to do so. They abandoned the land, and agreed that *Dukes* should convey to the plaintiff. No fraud was proven or even insinuated in *Bradley & Dukes*.

Even if this possession could be considered as adverse, the defendant's title was imperfect. It is indispensably necessary to produce the judgment and execution under which the land is sold to perfect a sheriff's title.

But it is clear that if *Conyers* ever had a right to sell—that is, if he ever had an execution, against *Bradley*, that the purchase by *Broughton*, was a mere cover for *Bradley*; for his receipt for the money paid to *Conyers* is dated 3d

October, 1808, and on the sixth of November, 1810, he witnessed a receipt from *Bradley* and wife, to *Richardson*, for the consideration money paid for this very land. Can it be believed that if he had seriously bought the land in 1808, that he would have witnessed a transfer of it to another by *Bradley*, and not have interposed his claim?

The motion is dismissed.

Justices *Nott*, *Johnson* and *Huger*, concurred

Mr. Justice *Gantt* was absent from indisposition.

Levy, for the motion.

Miller, contra.

(a.)—*Nance vs. Reardon*, ante, 299. *Barkley vs. Scriven*, 1 *Nott & M'Cord*, 408.

THE STATE vs. JOHN HUDNALL, et al.

Where a declaration in prohibition set forth, that in the trial of a negro slave, by Justices and freeholders under the act of 1740, unauthorized individuals had tried the slave, and that testimony was received on the trial, in opposition to the rules of the Common Law; to which there was a general demurrer; held, that the plaintiff must have judgment, and a writ of prohibition issue, as the demurrer, admitted the truth of facts, on which a prohibition ought to be awarded.

It is not necessary that the ground on which the prohibition is awarded, should arise on the face of the proceedings of the inferior Court.

Where the matter suggested for a prohibition, appears on the face of the proceedings of the inferior Court, an affidavit of the truth of the suggestion is unnecessary; where it does not so appear it is essential that the suggestion should be verified by affidavit.

MOTION for a writ of Prohibition.

On the 23d day of December, 1819, on application before Mr. Justice *Gantt*, at Chambers, the following order was obtained, viz:

At Chambers—Columbia.

Ex Parte—A. Silliman—In the matter of Negro *Manuel*.

Whereas, *A. Silliman*, the alleged owner of negro *Manuel*, (committed before *John Hudnal* and *William Vaughn*,

acting as Magistrates, and *Warner Macon*, *Hartwell Macon* and *Joshua Spears*, as Freeholders, on a charge of administering poison to *Roger Parish*,) hath made application before me at Chambers, this twenty-third day of December, *Anno Domini*, 1819, for a Writ of Prohibition, to restrain further proceedings on the judgment which has been given on the trial of the said negro *Manuel*—and the said *A. Silliman*, by his suggestion on oath, having set forth certain matters as true, tending to show that in the trial which has been had on the charge exhibited against the said negro *Manuel*, the same was *Coram non Judice*, by reason that the said *John Hudnal* and *William Vaughn*, not having qualified according to law, as justices, were unauthorized to act in the capacity of Justices on the said trial—and that *William Macon*, not being a freeholder, was alike unqualified to set upon the trial of the said case; that in the progress of the trial, the directions of the act of assembly, in such case made and provided, were not pursued by those who acted as a Court upon that occasion; and that they did moreover depart from the established principles of the Common Law, by receiving in evidence the declarations of *John Hudnal*, neither given upon oath, nor in the presence of the accused. And whereas the said *John Hudnal* and *William Vaughn*, have failed to appear this day at 12 o'clock, pursuant to a notice, sworn to have been given by said *A. Silliman*, to shew cause, if any they could, against the granting a prohibition. And the causes set forth in the suggestion of the said *A. Silliman*, appearing to me sufficient to justify further investigation in the premises, more especially to restrain any innovation as to the admissibility of testimony against the rules of the Common Law, in a trial of this solemn nature, which goes to affect the life of the party accused.

In order, therefore, to a due and solemn examination of the several grounds of complaint, as set forth in the suggestion of the said *A. Silliman*, IT IS ORDERED, that all further proceedings on the judgment, rendered by the said Court, be staid, until examination be had by the Court of

Sessions, on the grounds of complaint, alleged in the suggestion of *A. Silliman*. And it is further ordered, that the said *A. Silliman*, do declare in prohibition, against the next sitting of the Court of Sessions, to be holden for Sumter district, setting forth therein the facts which have been by him alleged in his suggestion aforesaid; and that copies thereof be served upon the several persons who composed the said Court, to the intent that they may be made defendants therein, and may by their plea or defence, justify (if able so to do) the proceedings which have taken place, in order to the awarding a writ of consultation; or otherwise, if the facts shall, on trial be found true, and established by the verdict of a Jury, that in such case, a writ of prohibition may be awarded. And it is further specially ordered, that the said *A. Silliman*, do file his declaration in prohibition, in time for the persons hereby intended to be made defendants, to put in their defence, so that the case may be regularly at issue by the meeting of the Court of Sessions, next to be holden for Sumter district, as aforesaid, in order to as speedy a decision upon the case as the rules and practice of the Court will admit. And the Clerk of the Court of Common Pleas and Sessions, for Sumter district, is hereby ordered to make out copies of this order, to be certified under his hand and the seal of his office, and place the same in the hands of the sheriff of the said district, to be served upon the parties concerned, without delay.

Given under my hand, at Columbia, this 23d day of December, Anno Domini, 1819.

RICHARD GANTT.

In pursuance of this order, a declaration in Prohibition was duly filed, setting forth, among other things, the following special circumstances contained in the suggestion, viz. that *John Hudnal* and *William Vaughn*, acting as Justices, but without being so in truth and reality, and *Warner Macon*, and others, acting as freeholders, but not being such, tried a negro, named *Manuel*, the property of

Alexander Silliman, on a charge for administering poison to *Roger Parish*, and before whom the said negro was convicted and sentenced to be executed.

It was further alleged in the said declaration, that the negro had not been tried within the time which the law prescribes, after being apprehended ; that the master had not been notified of the accusation, and that on the trial of the slave, the testimony of *Roger Parish*, the prosecutor, was admitted without his being sworn.

To this declaration, the defendants filed a general demurrer.

Mr. Justice *Colcock*, before whom the case was tried, at October Term, 1820, sustained the demurrer, whereby the writ of prohibition was virtually denied.

An appeal was made to this Court, to reverse that decision, and that a writ of Prohibition do issue to prevent the execution of the sentence, on the following grounds, viz :

Because the general demurrer, admitting the facts alleged to be true, the said negro was not legally convicted, inasmuch as the Court which tried him was not legally constituted ; that the owner of the slave ought to have been notified of the trial ; that the trial ought to have been had within six days, and that *Roger Parish*, the witness, ought not to have testified against the accused, without being sworn.

Mr. Justice *Gantt*, delivered the opinion of the Court.

The clause of the act establishing this mode of trying slaves for offences made capital, is prefaced in these words : " Whereas natural justice forbids, that any person of what condition soever, should be condemned unheard, and the order of civil government, requires that for the due and equal administration of justice, some convenient method and form of trial should be established : *Be it therefore enacted*, that all crimes and offences which shall be committed by slaves, for which capital punishment shall, or lawfully may be inflicted, shall be heard, examined, tried,

adjudged and finally determined by any two justices assigned to keep the peace, and any number of freeholders, not less than three, nor more than five, &c. *P. L.* 165.

The last clause declares that the act shall be deemed a public act, and shall be taken notice of without pleading the same, before all Judges, Justices, Magistrates and Courts.

Such a tribunal, therefore, as the one now established, can have no powers by intendment; and only such a mode as that expressly pointed out, is competent to try in any capital case.

Would it not be in direct violation of the principles of natural justice, as well as the order of civil government, for unauthorized individuals to usurp jurisdiction in cases of this sort, and proceed to award, and carry into execution the solemn and awful sentence of death? And if such usurpation takes place, is there no authority under the government sufficient to put it down? It would be lamentable indeed, if such was our situation.

The pleadings here admit that unauthorized individuals have tried this slave, and that on the trial, testimony was received in opposition to the rules of the Common Law. Either is quite sufficient to justify this Court in declaring that the judgment on the demurrer should have been the reverse of what it was, and that on such admission of facts, a Prohibition might well have been awarded.

It is almost unnecessary to remark, that this Court has a superintendency over all inferior Courts and tribunals. and may, in all cases of innovation, award a Prohibition, (*F. N. B.* 43,) which is a remedy provided by the Common Law, against the encroachment of jurisdiction, or the calling of a person to answer in a Court that has no legal cognizance of the cause. (3 *Black. Com.* 111.) And there can be no question, but that the granting a prohibition, is discretionary, and depends upon the circumstances of the case.

It was supposed, by my brother *Colcock*, that after sentence in the supposed Court holden by Magistrates and

Freeholders, a Prohibition could not be awarded, unless the ground alleged for it should appear on the face of the proceedings. But this is certainly a mistaken view of the law. The true distinction is, that *when the matter suggested for a Prohibition, appears upon the face of the proceedings, an affidavit of the truth of the suggestion is unnecessary. Where it does not so appear, then it is essential that the suggestion should be verified by affidavit.* (Godfrey vs. Llewellyn, Salk. 549. Eaton vs. Barton, Cow. 330. Buggin vs. Bennet, 4 Burr. Rep. 2040.)

But this is not a case falling within the meaning of English decisions. It is a case *sui generis*, where a tribunal is created by act of assembly, to try cases of life and death, and contrary to the rules of the Common Law. Every feeling of humanity and justice revolts at the idea, that any other mode of trial, less formal and substantial than what the act has prescribed, should be sanctioned. By the demurrer in this case, it would appear that such deviation has taken place, that *unauthorized individuals have undertaken to try, in a case affecting life, and in their trial, have departed from the known and acknowledged rules of the Common Law, by admitting, against the accused, illegal testimony.*

With these views, the Court think that the decision made by the Presiding Judge, should be set aside. But the defendants are still allowed to plead to the declaration, and in time for the trial of the cause at the next Circuit, to be holden for Sumter district, on the ——— Monday of October next. And in the mean time, and until a final decision can be had thereon, the defendants are prohibited from all further proceedings on the trial had against negro *Manuel*.

Justices *Nott, Johnson, Richardson and Huger*, concurred.

Levy, for the motion.

Miller, contra.

The STATE vs. ARCHY MAYSON, et al.

The plea of *non est factum*, simply puts in issue, the *existence* of the obligation.

A recognizance to support a bastard child, though not taken according to the act of assembly, may be good at Common Law.

A defendant will not be allowed to plead *non est factum*, and demur also.

THIS was an action of debt on a recognizance to support a bastard child, tried at Abbeville, Fall Term, 1819.

The declaration was upon "a writing obligatory, commonly called a recognizance."

There was but one security to the recognizance.

The general issue was pleaded, and a motion made for leave to demur in addition, which was overruled. A motion was made for a nonsuit, which was also overruled.

The defendants moved for a nonsuit, to set aside the verdict, and to arrest the judgment.

1st. Because debt on such a recognizance, cannot be maintained.

2d. Because the recognizance was void, having but one security and leaving the principal liable to an indictment for bastardy.

3d. Because the Presiding Judge refused leave to demur.

Mr. Justice *Richardson* delivered the opinion of the Court.

A recognizance is an obligation of record. It is in most respects like other bonds. The chief difference being, that a *bond* is the creation of a fresh debt; but the *recognizance* is an acknowledgment of a former debt of record. It acknowledges a sum due by certain and express agreement, which is the precise character of the contract, for which debt is the proper remedy. (*F. N. B.* 119.)

But as it is unnecessary, the Court gives no opinion upon that point. In the case before us, the general issue was pleaded, which simply put in issue the existence of the obligation declared upon, as this Court has before decided

in the case of the *Commissioners of the Poor vs. Hannion*, (1 *Nott & M'Cord*, 554,) which was also upon an obligation very irregularly drawn to support a bastard.

The same answer may be made to a second ground of objection; but upon this, I will remark that the obligation, though not taken precisely according to the statute, would probably be valid at Common Law, under any form of pleading. Of this too, we have an imposing authority in an early decision in the case of the *Commissioners of the Treasury vs. the Securities of W. Davis*, a sheriff, whose bond differed in the amount required by the statute, but was holden to be binding at Common Law, though expressly put in issue. Any other conclusion would encourage minute but designed differences from the precise requisitions of an act.

The third ground is, that the judge refused the defendant's motion for leave to demur, in addition to the general issue; but no law or practice has been suggested which would authorize such double pleading. And certainly if any pleas are inconsistent, *non est factum* and a demurrer, the object of which would be to bring also the form of the action in issue, would be among those selected for inconsistency.

To conclude then, the proceedings, if not strictly correct, were by no means void, and the motion in arrest as well as for a new trial, cannot prevail, both being predicated upon the form of the action; and the affirmative of the issue being proven, no nonsuit could follow. The motions are therefore refused.

Justices *Colcock*, *Nott*, *Gantt* and *Johnson*, concurred.

Mr. Justice *Huger* absent from indisposition.

M'Duffie, for the motion.

Whitner, contra.

CONSTITUTIONAL COURT

OF

South-Carolina, May Term, 1820—Charleston,

JUSTICES PRESENT THIS TERM.

ELIHU H. BAY,	DAVID JOHNSON,
CHARLES J. COLCOCK,	RICHARD GANTT,
ABRAHAM NOTT,	DANIEL E. HUGER,
JOHN S. RICHARDSON.	

SAMUEL OSBORNE *vs.* RICHARD BRENNAN, *sen.*

To charge a person as a partner, one of two things is necessary, viz. he must have permitted his name to be used as one of the firm, thereby holding it out as a security to the community; or he must have participated in the profit or loss.

THIS case came before the Court on the following report of the Recorder of the Inferior City Court.

“This action was brought against the defendant as survivor of the firm of *Brennan & Stone*, upon the ground that *Brennan* was a dormant partner.”

“The evidence produced to establish the partnership, consisted of two letters written by the defendant to *Mr. Stone*, and the depositions of a *Mr. Murray*, examined under written interrogatories. The letters merely show the consignment of certain articles to *Stone*, by the defendant, with some directions respecting their disposition. *Mr. Murray* said that *John Stone* kept a store in *Beaufort*, which was supplied with goods by the defendant; and that he, (witness) was present, when an agreement was entered into between the defendant and *Stone*, respecting the articles consigned. The answer of the 6th interrogatory being objected to as containing inadmissible testi-

mony, and the objection being sustained, no other evidence than the foregoing was offered in support of the action." He remarks that he observed to the Jury, "that to render the defendant liable as a dormant partner, it was incumbent upon the plaintiff to prove that the deceased, *Stone*, and himself, divided the profit and loss of the property disposed of by the deceased; or that the defendant had allowed the deceased to hold him out as jointly concerned with him; that these requisites had not been established, and that nothing more had been shown than that the defendant furnished *Stone* with goods, as he might any other shop keeper. I therefore thought the defendant was entitled to a verdict."

The Jury found for the plaintiff.

The grounds taken on a motion for a new trial, were:

1st. That there was not sufficient evidence on the part of the plaintiff to prove the existence of any copartnership in business between the defendant and the deceased, *John Stone*, so as to make the defendant responsible as a surviving partner.

2d. That if there was evidence of any connection in business between the said parties, there was none to prove the plaintiff's demand to be on the account of such concern, or within the sphere of their transactions.

3d.—That the evidence, on the part of the plaintiff, consisting of letters written by him, to the deceased *John Stone*, proved the transaction to be merely a consignment of the articles by the defendant to *J. Stone*, to be sold on his (the defendant's) account, disproving an actual sale to the said *J. Stone*, as alleged by the plaintiff, and showing the transaction to be very different from the species of business attempted to be proved to have been carried on by the defendant and *J. Stone* at Beaufort.

4th.—That the verdict of the Jury was against the charge of his Honor the Presiding Judge.

5th.—That the verdict was generally contrary to law and the evidence adduced at the trial.

Mr. Justice Johnson delivered the opinion of the Court.

To charge a defendant as a partner, one of two things is necessary, either he must have permitted his name to be used as one of the firm, thereby holding it out as a security to the community, or he must have participated in the profit or loss.

The first of these is directly contradicted by the evidence of the plaintiff. The goods are charged to Stone alone in the plaintiff's books, and it follows, must have been delivered on his credit.

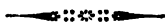
If the defendant be liable, then it is in respect of his participation in the profit and loss of the house at Beaufort, and of this there is not the least proof. If the bare fact of supplying a house with goods be sufficient evidence of a copartnership, the whole commercial world would constitute but one family and one firm. However grand in theory this state of things might appear, it would be found too unwieldy for practical uses.

The evidence in this case furnish no other fact from which the existence of a partnership can possibly be inferred. It follows therefore, the verdict is wholly without evidence; and a new trial ought, I think, to be granted.

Justices *Nott*, *Bay*, *Richardson*, and *Huger*, concurred.

Lance, for the motion.

Dunkin, contra.



JOHN CROMPTON & Wife vs. MARGARET ULMER, Executrix of PETER ULMER, deceased.

Under the act of 1791, the Court of Common Pleas has no right to grant writs of Partition, except in cases of intestacy.

The Court of Common Pleas had no power to order a sale of lands under the act of 1748.

THIS was an application, at Colleton district, April Term, 1818, for a writ of Partition, to divide the real and personal estate of *Peter Ulmer*, deceased, according to the

disposition of the last will and testament of the deceased.

The testator, by his will, left all his property to be equally divided between his wife, the defendant in this case, and his children when the youngest child should arrive to the age of fourteen. The youngest child having arrived to that age, the demandant, who intermarried with the daughter of the testator, applied by consent of the executrix, for a writ of partition, and the appointment of a guardian (*ad litem*) for the minor children.

The Presiding Judge refused to grant the writ of partition, on the ground, that this was a case of testacy, and that the Court had not power under the act of 1791, to make distribution in cases of testacy.

The demandant now moved the Constitutional Court to set aside the decision of the Judge, and to grant an order for a writ of partition.

This was the case stated from the brief, and it was further stated by the counsel, that it was the object of the parties to effect *a sale of the land, it not being susceptible of division.*

Mr. Justice Colcock delivered the opinion of the Court.

It is to be apprehended, that many cases of this kind, have passed without notice. But upon a reference to the acts on this subject, it will be found that the Court have no authority to make partition in such case.

The act of 1791, (*1 Faust* 23. *1 Brev.* 422.) most clearly and exclusively relates to the distribution of the estates of intestates. The preamble of the act states, that "Whereas the convention of this state by the fifth section of the tenth article of the constitution, passed the third day of June in the year of our Lord one thousand seven hundred and ninety, did direct, that the legislature should as soon as might be convenient, pass laws for the abolition of the rights of primogeniture and for giving an equal distribution of the real estates of intestates." And in the first clause it is enacted, that the right of primogeniture be and the same is hereby abolished; and that when any person

possessed of, interested in, or entitled unto, a real estate, in his or her own right in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner: Here then is the strongest and most explicit language which can be used, to show, the act relates to the distribution of the estates of intestates, and this is confirmed by every subsequent clause. The act then proceeds to point out the mode in which distribution shall be made, and enacts, that any person entitled to a distributive share of any estate may apply, if of full age, or married, to the court of equity or common pleas, and obtain a writ directed to commissioners to divide the estate, and the commissioners are directed in case they cannot divide the property, to make a special return of the value thereof, and the court are authorized to make such rules and orders as may be necessary to effect the division; in the language of the act "to carry the foregoing clause into effect." This power so given in this act can have relation to no other partition or distribution of property than that which arises under the act. This I think is clear; first, because the authority is given in that act, and was necessary to enable the court of common pleas to act: Secondly, because the words "distributive share," apply in legal understanding to that portion of an intestate's estate to which one would be entitled; and not to a bequest or devise; and in this view of the act my brethren unanimously concur.

But it was said, that the order might have been granted for partition of the land under the act of 1748, (*P. L.* 218 2 *Brev.* 102.) This act declares, that "*Whereas* no provision hath hitherto been made for the division of lands in this province, held in coparcenary, joint-tenancy, and tenancy in common, *Be it enacted*, That in all cases where any lands shall be given or descend to any persons in coparcenary, joint-tenancy, or tenancy in common, (and no provision made by will or otherwise, how such lands shall be divided,) when, and as soon as any one of the said coparceners, joint-tenants, or tenants in common, shall be of the

age of 21 years, he or she shall or may apply to the court of common pleas for a writ of partition; and in case he or she shall neglect to do so by the space of 12 months, then the guardian or guardians of him, her or them, under age, shall be and they are hereby required and directed to apply to the said court of common pleas, for a writ of partition;" and that it be directed to five commissioners who shall make partition within three months, and such partition shall be final and conclusive. Under this act it is clear, the court have no power to order a sale of lands, and therefore the object of the present applicant could not have been effected. But if it could, it certainly would be very inconvenient, especially as to a small estate, to obtain a writ of partition from the court of common pleas to divide the lands, and then apply to the court of equity, for the same writ, to divide the negroes. It is better to apply to that court which could take cognizance of the whole matter.

Again, there were minors concerned in the estate to be divided, and they had no guardians. Now the act directs, that their guardians may or shall apply, meaning as I presume, guardians of their persons and property, appointed by the court of equity, for before the act of 1791 and 1808, this court had not the power of appointing guardians of the person and property, and now by the latter act, the power is expressly restricted to cases of intestacy, and in my opinion, ought to be restricted to the court of equity, from whom it was taken by necessity, that court being at that time inaccessible to the greater portion of the community.

The motion is dismissed.

Justices *Nott, Bay, Johnson, and Huger*, concurred.

Justices *Richardson and Gantt* dissented.

EDWARDS & HAIG vs. MYER MOSES.

Although the Drawer of a bill of Exchange, between the making and the time at which the bill becomes due, draws all his funds out of the hands of the drawee, this alone will not dispense with the necessity of the payee's presenting the bill for payment when it becomes due, and giving the drawer notice of non-payment.

If the drawer of a bill of Exchange has no effects in the hands, of the drawee from the date till the time of payment, demand and notice are dispensed with: But there should be a total absence of all effects during all that time.

And it should appear that the Drawer knew that there would be no effects; and that where the effects failed from accident, and did not reach the Drawee, demand and notice are not dispensed with, *semble*.

THE Recorder of the Inferior City Court reports the case as follows: The check in this case was drawn by *Brown & Moses*, upon the Planters & Mechanicks Bank, for \$——, in favour of the plaintiffs. It appeared from the evidence, that the plaintiffs had ascertained, that at the time when the check ought regularly to have been presented, *Brown & Moses* had drawn all their funds out of the bank, so that had the check been presented, it would not have been paid. It was stated, nevertheless, that the check had been presented, but this fact was not proved. The action, conformably to the provisions of the insolvent debtors act, was brought against *Myer Moses*, alone, as between the date of the check and the commencement of the action, *Joshua Brown* had taken the benefit of the act for the relief of insolvent debtors.

The defendant's counsel moved for a nonsuit upon the grounds:

1st. That no proof had been exhibited, to show that there were no funds in the bank at the time when the check ought to have been presented.

2d. That it should have been proved that a demand had been made upon the drawer for payment, even admitting no funds in the bank.

3d. That the fact of there being no funds in the bank,

when the check was payable, was not proved to have been known to the defendant.

Under the special circumstances of this case, the motions for a nonsuit were overruled, and the case being submitted to the Jury, they found a verdict for the plaintiffs. Notice was served upon me, that the defendant's counsel would move, at the Constitutional Court for a nonsuit, upon the ground, that there was no evidence of a presentment, or a demand made for the payment of the check in question.

WM. DRAYTON.

It was admitted that at the trial of this case in the Inferior City Court, the plaintiffs produced in evidence a copy of the account of *Brown & Moses*, as it stood in the books of the Planters & Mechanics Bank, at the time when the check given to the plaintiffs should have been presented, and that by the said statement, it appeared that the check drawn by the said firm of *Brown & Moses*, in favour of *I. C. Moses*, for \$—, and some cents, had been paid, and which said check had drawn out of the bank the funds of the said firm, to the last cent.

Mr. Justice *Richardson* delivered the opinion of the Court.

It does not expressly appear, whether there were funds of the drawers in the bank, at the date of the check, though it seems implied, that they were afterwards drawn out by another check, the date of which doth not appear.

It is now well settled, that *if the drawer has no effects in the hands of the drawee, from the date to the time of payment, demand and notice are dispensed with.* (1 Term Rep. 405. 2 Term Rep. 713. Swift 290.) But this exception requires, that there should be a total absence of all effects during all that time. (2 Camp. 503. 12 East 174.) And I apprehend, it should appear, that the drawer knew that there would be no effects, (2 Term 713,) and that where the effects merely failed by accident, and did not

reach the drawee, demand and notice are not dispensed with.

By the decisions of this court in the case of *Sutcliffe & Bird vs. M'Dowell*, and in *Lilly vs. Miller*, demand and notice are also dispensed with, where the drawer purposely withdraws his effects in order to defeat his own bill; and where he forbids the drawee to pay, as in the latter of those cases. But the case before us comes within neither of these exceptions. It is the common case of an *overdrawing*, which, if permitted to form another exception, would fritter away the established rule requiring notice generally; and would very frequently introduce very complex collateral issues: As whether any and what balance was in the hands of the drawee, or whether the drawer favored one bill more than another, and the like. Such consequences growing out of the case of *Sutcliffe & Bird vs. M'Dowell*, would be unfortunate.

In the case before us, it is certain only, that the check given to *I. C. Moses* swept the balance of money in the bank belonging to the drawers. But does it appear, that *I. C. Moses* was not a real creditor, or that the money was purposely withdrawn by the defendant, to defeat the plaintiff's check? By no means.

The general rule then applies in all its force; demand should have been made, and notice given.

The motion is therefore granted.

Justices *Bay*, *Nott*, and *Johnson*, concurred.

Axson, for the motion.

Bentham & Parker, contra.

FOSTER BURNETT vs. BALLUND & SARZEDAS,

The act of 1815, with regard to Vendue Masters, is not unconstitutional.

The act of 1815, embraces debts due on account of sales made since the passing of the act.

To render a firm liable as Vendue Masters, it is not necessary that they should have taken out a license in their joint character as partners. A motion in arrest of judgment will prevail only where error is apparent on the face of the record.

THIS case was tried in the Inferior City Court at March Term, 1820, where a verdict was found for the plaintiff.

On a motion in arrest of judgment, and for a new trial, made in this Court, the case made by the report of the honorable the Recorder, was substantially as follows :

The defendants had severally obtained licenses as Vendue Masters, and afterwards entered into a copartnership in that business, and this was an action against them as Vendue Masters, founded on the act of the legislature of 1815, to recover money due by them to the plaintiff, arising from sales made on account of the plaintiffs.

There was no dispute about the legality or correctness of the plaintiffs demand. But his recovery in this action was resisted on the ground, that the act of 1815, usually called the vendue act, was unconstitutional and void. If not, that defendants, although each had a license as vendue master in his own name, were not liable as a firm in the character of vendue masters, without a license had been granted to them as a firm.

These objections were overruled, and the grounds stated in the brief, as the basis of the motion were :

1st. That the act under which the action was brought, is contrary to the spirit and letter of the constitution of the state.

2d. That to render the defendants liable as vendue masters, it should have been proved as well as alleged, that the defendants acted under a license in their joint character as partners.

3d. That the act only relates to debts due by vendue masters, on account of sales made before the passing of the act, and not subsequently ; and as this sale took place subsequently, the defendants could not be sued under it, so

as to deprive them of the benefit of the insolvent debtors act.

Mr. Justice *Jolinson* delivered the opinion of the Court.

This case has been submitted without argument, and it is sufficient to remark, so far as relates to the motion in arrest of judgment, that it can only prevail in cases where error is apparent on the record, and none has been pointed out or alluded to in this case. It is presumable, therefore, that it found its way into the brief by mistake.

We are equally in the dark on the question made as to the constitutionality of the act, and its application only to debts due at the time it was passed, and not to those which accrued afterwards.

The act provides, that "from and immediately after its passage, the owners of property placed in the hands of vendue masters or auctioneers, either for public or private sale, are hereby authorized and empowered to recover from the said vendue masters in the most summary manner, &c." And that the same may be recovered with the least possible delay, the court is authorized to make such summary rules and orders as may be agreeable to justice and tend to expedite such causes; and takes away from them the benefit of the act for the relief of insolvent debtors. I am unable to conceive any idea on which to found an argument, that any of these provisions are at variance with the constitution. A speedy and adequate remedy for a wrong done, is no where prohibited: On the contrary, the "*laws delay*," is justly and deservedly regarded as an evil to be borne only because it cannot be remedied, and I find the same difficulty in applying it only to debts then due.

The only ground to be considered then, is whether the defendants are liable as vendue masters, not having a license in their joint character as a firm?

When any individual or company take upon them a character, upon the faith of which they gain employment

or derive a benefit, whether they be legally entitled to it or not, they will not be permitted when called on to answer in that character to allege as an excuse, that it was only assumed, for no man will be allowed to take advantage of his own wrong.

The motion is dismissed.

Justices *Bay*, *Nott*, and *Huger*, concurred.

Crafts & Eckhard, for the motion.



PLANTER'S & MECHANIC'S BANK *vs.* S. E. COWING &
E. WAGNER.

SAME *vs.* SAME.

SAME *vs.* SAME.

SAME *vs.* SAME.

Where a motion is made to consolidate two actions on two promissory notes, which joined, would exceed the jurisdiction of the city court, after verdict the motion will be refused.—(a.)

The court after verdict will not strike out one of the defendants, on the ground that he is not within the jurisdiction of the court.

THESE suits came before the constitutional court upon the following report of the Recorder of the Inferior City Court :

“ They were brought upon two promissory notes, one of them for two hundred and eighty dollars, dated 10th April, 1819, payable fifty-five days after date, drawn by *Wagner & Cowing* in favor of, and indorsed by, *S. E. Cowing & E. Wagner*: The other note was for four hundred and fifty dollars, dated 8th May, 1819, drawn and indorsed by the same parties, and payable fifty-five days after date.

“ The writs were all returnable for the *same return day*,

and the declarations were filed, and the pleadings made up on the same day.

“*Mr. King* appeared for the defendants, and filed pleas of the general issue. Understanding that there was no defence, the records were delivered to the jury without any observations from the court.

“On the day after the verdicts had been obtained for the plaintiffs, a motion was made by the defendant's attorney to have the actions consolidated. I considered the motion as one addressed to the discretion of the court, which would always grant it, where the causes of action might be joined, and where no good reason could be shown, why they should not be; but I nevertheless overruled the motion in these cases, because if it prevailed, the causes of action would exceed the amount within the jurisdiction of the court, consequently, the suits of the plaintiffs would be virtually discontinued and they would be compelled to commence their action *de novo*.

“Notice was served upon me, that a motion would be made before the constitutional court to oblige the plaintiffs to consolidate their actions in the above cases, on the ground, that the *writs* are to the *same term*, by the *same plaintiffs* against the *same defendants*, on two promissory notes made by the *same drawers* and indorsed by the *same indorsers*; and in the cases against *Wagner and Cowing* a further motion will be made to strike the name of *Ward Cowing* from the record, on the ground, that he is not within the jurisdiction of this court.”

WM. DRAYTON.

Mr. Justice *Nott* delivered the opinion of the Court.

The court are of opinion, that the first motion in this case ought not to prevail, for the reasons stated in the report of the recorder.

The second also came too late. The subject matter of the suit was within the jurisdiction of the court; and if the party chose to submit to the jurisdiction, he could

not take the exception after trial. That motion also must be refused.

Justices *Gantt*, *Richardson*, *Johnson*, and *Huger*, concurred.

King, for the motion.

Hunt, contra.

(a.)—PLANTERS & MECHANICS BANK vs. MOSES COHEN.

CHARLESTON, JANUARY TERM, 1820.

Where several actions are brought on notes, all drawn by the defendant, all made to the same person and endorsed by him to the bank, they will, on motion, be consolidated; but where one of the notes has another endorser, the motion will be refused.

In this case, it appears that five several actions were commenced on five several promissory notes, all drawn by the defendant, and all made payable to the same person, and endorsed by him to the bank.

An application was made to the Circuit Court for an order for consolidation, which was refused, and now a motion is made to reverse that decision.

Mr. Justice *Huger* delivered the opinion of the Court.

A motion for an order to consolidate, is an application to the discretion of the Court. When satisfied that no injury will result, the Court will always grant the motion. In these cases, the plaintiffs are the same, the defendants the same, the drawers the same, the payees the same, the endorsers, with the exception of one, the same; the declarations are transcripts of each other, and so are the pleas. No injury can result to either party from consolidating four of these cases, and much expense would be saved to the defendant. These cases therefore ought to have been consolidated.

Some inconvenience is anticipated, from blending in the same action, notes with different endorsers. The fifth, therefore, ought to be kept separate.

I am of opinion, therefore, that the decision of the Circuit Court ought to be reversed as to the four cases, with the same endorsers, and confirmed as to the fifth case, where there was an additional endorser. As the plaintiff has been sanctioned in these proceedings, so far by the Circuit Court, costs must be paid by the defendant up to the time of consolidation.

PRESIDENT and DIRECTORS of the BANK of the UNITED STATES *vs.*
MOSES COHEN.

The rule laid down in the preceding cases, will govern in this. The two actions brought on the notes drawn by the defendant, must be consolidated. The action brought on the note on which he is only endorser, may be kept separate. Costs which have already accrued, must be paid by the defendant. (1)

Justices *Johnson*, *Richardson* and *Nott*, concurred.

(1) S. P. President and Directors of the U. S. Bank *vs.* Abraham Isaacs. See also *Scott vs. Brown*. (1 *Nott & M'Cord*, 417.) R.



THE STATE *vs.* OWEN BUNTEN.

Where a man is indicted for stealing a cow and calf, and no evidence is given as to the calf, and general verdict of guilty is found, a new trial will be granted.

THE defendant in this case was indicted for stealing a cow and calf.

There was no evidence with regard to the calf; the jury nevertheless found a general verdict of guilty.

This was a motion for a new trial on the ground, that the verdict was contrary to evidence.

The case was tried at Colleton, Spring Term, 1820.

Mr. Justice *Nott* delivered the opinion of the Court.

It would be sufficient in this case, to say, that the question has already been decided in the case of the *State vs.* ———. The defendant in that case had been indicted for stealing two cows. It was abundantly evident, that he had stolen one, but there was no proof against him as to the other. The jury however found a general verdict. The next day it occurred to the solicitor, that the verdict was wrong, as the defendant stood convicted of stealing two cows, when in fact there was no evidence, that he had stolen but one. He therefore moved the court to permit the jury to amend their verdict so as to correspond with

the testimony, which motion was granted. But on a motion in this court it was held, that the court below had no power to amend or alter the verdict after the jury had separated; and a new trial was granted.

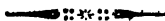
In ordinary cases of larceny, where a person is charged with having stolen several articles, and he is proved to have stolen only some of them and not all, a general verdict is good, because the punishment will be the same. But in this case the punishment is double, the penalty being increased in proportion to the number of animals stolen.

The motion for a new trial must be granted.

Justices *Bay, Richardson, Huger, and Johnson*, concurred.

White, for the motion.

Pettigrew, contra.



N. G. CLEARY vs. N. G. WELLS.

The act of 1816, allowing to a juror one dollar *per* day for his services, has not repealed the part of the fee bill of 1791, allowing juries five shillings for every verdict.

The jury have a right to retain the record on which they have found a verdict, until five shillings have been paid them.

IN this case the jury refused to deliver the record on which they had found a verdict for the plaintiff, until they were paid five shillings, the sum allowed for a verdict by the fee bill of 1791.

The plaintiff contended, that the act of 1816, allowing to each juror one dollar *per* day for his services, had repealed that part of the fee bill of 1791, under which the jury claimed their fee.

It was ruled by the Presiding Judge, in the circuit court, that the act of 1816, had not repealed the fee bill of

1791, and he directed the plaintiff to pay the fee demanded by the jury.

From this decision an appeal is now made on the following grounds :

1st.—That the judge on the circuit had given an erroneous construction to the act of 1816 : And

2d.—That if the jury were entitled to the fee of five shillings, they had no right to retain the verdict until it was paid.

Mr. Justice *Huger* delivered the opinion of the Court,

In the act of 1791, the legislature has fixed the fees of the different officers of the state, and has allowed to the jury for every verdict five shillings. (1 *Brev.* 346. 1 *Fst.* 9.)

In the year 1816, the legislature declared, that the duties performed by jurors were unequal and burdensome, and enacted, that for each day's service a juror shall be allowed one dollar out of the public treasury. There are no words in this act expressly repealing the fee bill of 1791, and their provisions do not appear to be repugnant. The legislature intended, by the act of 1816, to increase the allowance of the juror, and not to lessen the costs of suit. In many cases, were the fee of five shillings, for each verdict withheld from the jury, the *per diem* compensation would not be an equivalent therefor. The court is of opinion, that the act of 1816, does not repeal the fee bill of 1791, and therefore the appeal from the circuit court cannot prevail on the first ground.

It has been the long established practice in this state for the juries to reclaim their verdicts after publication, and before they are recorded, to coerce the payment of their fees, and no inconvenience has hitherto been experienced from this practice. It very frequently happens indeed, that the juries trusting to the known honor of the gentlemen of the bar, permit verdicts to be recorded before the fees are paid, and no jury is yet known to have suffered from this confidence. Should the jury however be disposed to retain the verdict until the fee be paid, the court

is of opinion, they have a right to do so. On the second ground therefore, the appeal must also fail.

The motion is dismissed.

Justices *Richardson*, *Colcock*, *Nott*, and *Johnson*, concurred.



THOMAS M'COLGAN vs. JAMES HUSTON.

Where a writ of replevin is lodged with the sheriff, who retakes part of the goods, and returns *Elongata* as to the rest, a *Withernam* may issue.

An *alias* and *pluries* are unnecessary in this state, as a writ of replevin is a returnable writ; and therefore on the return of *Elongata* on the Original writ, a *Withernam* may issue.

Where property taken by a *Withernam* is claimed by a third person, the Court will not on motion of the claimant, decide on a contested right.

THIS was an action of replevin. The property of Thomas M'Colgan, who was the tenant of Huston, was distrained for rent on the 8th of July, 1819.

On the 12th, a writ of replevin was lodged with the sheriff, who retook a part of the distress, but not the whole, and on the — day of —, the sheriff made a return of *elongata*, as to the part of the distress he had not been able to find.

On the 7th August, a *withernam* was applied for and obtained, upon which the sheriff took a negro man as the property of the defendant Huston.

It further appeared, that immediately before the *withernam* issued, the defendant Huston had conveyed in a deed of gift, this negro with other property, to his brother Jennings.

An application was then made to the Circuit Court, to quash the *withernam*, on two grounds:

1st. That it was a process unknown in this state, and

2d. That if it were not obsolete, it could only issue after an *alias* and *pluries*.

The judge on the Circuit, overruled the motion to quash the *withernam*.

A motion was then made on behalf of *Jennings* to discharge the negro man on the ground, that he was the property of *Jennings* before the *withernam* issued; and this motion was also refused.

A motion was now made to reverse the decision of the Circuit Court.

Mr. Justice *Huger* delivered the opinion of the Court.

I shall proceed to consider the different grounds taken in this case, in the order they were submitted.

The action of replevin has been long used in this state, and the process of *withernam*, is only incidental to it. That it has not been used, may be the effect of accident; perhaps no fit occasion has hitherto been presented for its application. As long as the sheriff could retake the distress, the *withernam* would not be resorted to; but if ever he made the return of *elongata*, "that the property had been eloiigned," it is difficult to imagine how the process of the *withernam* could have been neglected; its use appears essential to the action of replevin. It would, at least be very incomplete without it, and I am unable to discover any objection to its use. It is a Common Law process, and appears as applicable to the circumstances of this country as any other. I am of opinion therefore, that on the first ground taken, the appellant must fail.

But it is contended, that at Common Law it could only issue after an *alias* or *pluries*, and that in this case, it followed immediately the original writ of replevin.

At Common Law, the original writ of replevin was not a returnable process; it was only directory. The sheriff was commanded to restore the goods distrained to the plaintiff, and if he did or did not, the writ did not require him to make a return of his proceedings into court. An *alias* and *pluries* were necessary therefore to bring him

into Court for the *alias* required him not only to restore the distress, but if he did not, to assign his reasons for not so doing to the Court, *vel nobis causam significas*, in the language of the writ. The *alias* and *phuries*, are however rendered unnecessary in this state by the act of 1808, which makes the writ of replevin a returnable writ. The sheriff, therefore, under our act, returns *elongata*, on the original writ, and thereby renders unnecessary an *alias* and *phuries*. For, at Common Law, the *withernam* always follows the return of *elongata*, the object of which is to take from the defendant, goods to such an amount as will secure the return of the plaintiff's. It is in the language of the law "a reprisal." (See *Weaver vs. Lawrence*, 1 Dal. 156. 6 Bac. Dalton's Sheriff. Gilbert on Replevin. Sellon's Practice.) I am therefore of opinion that the appellants must also fail on the second ground.

The motion made in behalf of Jennings appears to have no connection with this case. He is not a party to the suit; he however set up a claim to the negro, and on motion, wished the Circuit Court to decide on a contested right of property. The Circuit Court properly refused to interfere. If his property has been taken by the sheriff without authority, he has another remedy.

The motion is therefore dismissed.

Justices Bay, Colcock, Nott, Gantt, Johnson and Richardson, concurred.



MARY LLOYD vs. HONORE MONPOEY.

It is unusual for the court to grant a new trial on the ground of excessive damages where injuries have been done to property under highly aggravated circumstances; the amount must always be a matter for the sound discretion of a jury.

Where in action on the case for beating a negro, evidence of the defendant's character is given, to which no objection is made on the trial, it will not furnish a ground for a new trial.

Where a new trial is moved for, on the ground, that one of the plaintiff's witnesses had been bribed to swear falsely, to which fact the witness makes affidavit, it will be sufficient objection to the admission

of the affidavit, that a copy of it was not submitted to the plaintiff; but waiving that objection, a new trial will not be granted on that ground *ut semble*.

THIS was an action on the case, for beating a negro of the plaintiff, tried in the Inferior City Court of Charleston, March Term, 1820.

The Recorder has made the following report of the case :

“ *Miss Lloyd*, the plaintiff's daughter, said, that *Chloe* was the property of the plaintiff; that defendant came into her mother's house, in *Bull-street*, whilst the family were at the dinner table; that in her presence and in that of her mother, the defendant assaulted *Chloe* violently with his fists, knocked her down, gave her four or five blows about the head, kicked her twice in the back, and swore he would have her ears; that the family were much alarmed; that the defendant gave no reason for his conduct; that when knocked down, *Chloe* bled profusely, in which state the defendant kicked her; that in consequence of this beating, *Chloe* was sick a little more than a month and kept her room about two weeks. Upon being cross examined, this witness said, the defendant lived in the city of *Charleston* near her mother's, and had done so for some years; that he made this assault in June 1819; that she never heard of the defendant's having made any complaint to her mother, against *Chloe*; that the defendant, in striking *Chloe*, knocked her head against the ketch of the window, which she believed occasioned the bleeding; that Doctor *Bennett* was sent for by her mother, to see and prescribe for *Chloe*; that *Chloe* was mild and peaceable; that she was once punished upon an accusation of having robbed the defendant, who himself had her punished; that the defendant was in the habit of coming to her mother's house, and she never saw or heard of any quarrel between the plaintiff and the defendant; that *Chloe*, after she had been beaten, laid down for a considerable time, apparently insensible; the witness believed her to be dead.

“ *Mr. Thomas Bennett*, for the plaintiff, said, he believ-

ed *Chloe* belonged to the plaintiff; always saw her in the plaintiff's possession, who claimed her as her own; knows she was desirous of selling her; that he saw *Chloe* shortly after she had been beaten, she then seemed insensible; he examined her wounds which were considerable, particularly looked at one on her head, which he thought had proceeded from her head having been forced violently against a hard flat surface; that *Chloe's* clothes were very bloody; that the witness thought her skull had been fractured when he first examined her, but afterwards he changed his opinion; that *Chloe* was very much injured and continued in a state of insensibility a long time. Upon being cross examined, *Mr. Bennett* said, that when *Chloe* was punished at the time alluded to by the preceding witness, it had been afterwards discovered, that the theft with which she had been charged, had been committed by her husband, and that she was innocent; that he often saw *Chloe* who appeared to him to be trust-worthy, and was, he knows, much confided in by her mistress, the plaintiff. When the witness entered the plaintiff's house to see *Chloe*, he thinks the dinner table was standing.

"*Nancy Gough*, for the plaintiff, said, that *Chloe* was the wife of her brother; that when *Chloe* had been beaten in June last, she was called to nurse and attend her during her sickness: *Chloe's* back was very much bruised, and she had a deep cut on the back of her head; during the witness' attendance upon *Chloe*, she miscarried: *Chloe* for the first fortnight could not get out of her bed, that in witness' opinion, bruises of the nature of *Chloe's*, are very injurious to the constitution, as is a miscarriage; that in the fourth week of her confinement *Chloe* got up and attempted to do the ordinary business of the house, but could not. Witness is a professed nurse, and has herself had eight children.

Doctor *Holbrook*, M. D. for the plaintiff, said, that a violent kick in the back during pregnancy, frequently occasioned a miscarriage; that when a miscarriage is produced by such a cause, the constitution is generally mate-

rially injured, that it frequently destroys future breeding, and renders a woman less capable of undergoing ordinary work.

"*Sarah Hancock*, for the defendant, said, that she lived near the plaintiff when *Chloe* was beaten; that on a Tuesday, she heard of the beating, and on the next day, witness saw her sitting up in her bed; that on the Friday after, she saw *Chloe* in a back piazza shelling beans; on the Sunday after, witness saw her at the street gate, and in the week following *Chloe* was walking about the yard and sewing; that witness heard, that *Chloe* stole a fowl from the defendant's yard; *Chloe* confessed, that she had taken the fowl, but not that she had stolen it; that *Chloe* is very impertinent; has heard her very impertinent to the defendant. Upon being cross examined, the witness said, that she lives in the house with defendant, and has done so about two years; her husband having been absent that time; witness heard *Chloe* say, she had killed a fowl of defendant, not that she had stolen it; saw the defendant when he was going to the plaintiff's house, at the time when *Chloe* was said to have been beaten by him; he then seemed to be cool, not at all in a passion; when the witness saw the wench at the time she has specified, she did not appear to have been at all injured.

"*George Hancock*, for the defendant, said, he saw *Chloe* shortly after it was said she had been beaten; when he saw her, she was standing at the plaintiff's gate; she looked much as usual; could not discover, that there had been any thing the matter with her.

"*Mr. Patrick Duncan* was called by the defendant to testify as to the plaintiff's character. I considered this irregular, but as it was not objected to by the plaintiff's counsel, he was examined. *Mr. Duncan* said, the plaintiff bore a respectable character, and that he formerly had known the defendant, that his general character was then very bad, what it was at present, he did not know.

"The counsel for the defendant contended, that the plaintiff had not proved that *Chloe* was her property, without

which she could not recover, and that the plaintiff in no event, could recover more than to the precise amount of the injury which she had sustained in consequence of the beating which her negro had received.

"I told the Jury that the plaintiff had sufficiently established, that the negro woman beaten was her property, and that they were entitled to take all the circumstances of the case into consideration, and to give their verdict accordingly.

"The Jury found a verdict for the plaintiff in the sum of \$500."

This was a motion for a new trial, on the following grounds :

1st. Because the damages were excessive.

2d. Because the plaintiff did not prove a property in the negro ; but on the contrary, it was proved that the property did not belong to her.

3d. Because evidence as to defendant's character, not put in issue, was admitted.

4th. Because evidence was admitted as to damages that arose after the commencement of the action.

5th. That evidence was admitted to prove a material fact not averred in the declaration, viz. miscarriage in consequence of the beating.

6th. Because the witness on whose testimony the plaintiff chiefly relied, was bribed, and was intoxicated when examined, circumstances not within the knowledge of the defendant or his attorney, till after the trial of the cause.

7th. Because the verdict was, in other respects, contrary to law and evidence.

Mr. Justice *Nott* delivered the opinion of the Court.

It is very unusual in cases of this sort, to grant a new trial on the ground, that the damages are too high. They furnish no certain rule by which the damages can be estimated. The amount, therefore, must always be a matter for the sound discretion of the Jury, and must be regulated by the evidence of the case, and the circumstances of

the parties. The verdict does not appear so unreasonable, as to authorize the interposition of this Court. The defendant rushed violently into the house of the plaintiff, an unprotected widow, beat her servant most outrageously, in the presence of her family, when they were quietly at their dinner, and spread terror and consternation through the whole house, by his rude and riotous conduct. The disturbance of the peace of the family, and the indignity offered to their feelings were sufficient considerations for the verdict. But besides, slaves have no personal rights in this country. It is only through the medium of their owners that they can receive that security and protection for their persons, which it would be a reproach to the character of the state to withhold from them. In any point of view, therefore, I think the verdict may very well be supported.

The second is a mere technical objection, which is not to be encouraged. The evidence was sufficient to go to the Jury, and sufficient to sustain the action.

3d. The evidence of character was first introduced by the defendant's counsel, and as far as the examination was carried, it passed without objection, and was not ruled by the Court; it therefore furnishes no ground for a new trial.

The fourth ground is not supported. Evidence was not admitted of damages which arose after the commencement of the action. It was only evidence of a subsequent fact, which went to show the extent of the injury, which had been previously committed.

The fifth ground appears to be founded on a supposition that the evidence of miscarriage was given for the purpose of enabling the plaintiff to recover the value of the child lost; but I apprehend that the object of that testimony was merely to show the violence of the beating, and for that purpose, it was properly admitted.

But the most substantial ground, and indeed the only one on which the Court has had any difficulty, is the sixth; the

facts stated in that ground, are attempted to be supported by the affidavit of the witness herself, that she had been bribed, and had sworn falsely on the trial. It would be a sufficient objection to the admission of this affidavit, that a copy of it has not been given to the person accused of the subornation of perjury, that the charge might be rebutted. But even waiving that objection, I do not think it ought to be received. The discovery of parol evidence, after a trial, has never been admitted in this state as a good ground for a new trial. The tampering with witnesses, to which it would lead; the frauds and perjuries which it would introduce; and the endless litigation which would ensue, admonish us to be careful how we depart from that long settled, and I think, safe and necessary rule.

It is contended, however, that this case forms an exception to that rule, inasmuch as the subsequent testimony comes from the witness herself, who cannot be mistaken. But if she cannot be mistaken, she may be perjured. And there is as much reason to believe, that the last oath is false, as to doubt whether the first was true. It is nothing more or less than, allowing the witness to impeach her own testimony. And would not the case be equally strong, if the fact to which she swore on the trial had been contradicted by any other credible witnesses. Would it not indeed be stronger; for she proclaims her own infamy by the very testimony which she herself produces. It is admitted that the affidavits of other persons to the same fact, ought not to be admitted. And would it not be a strange inconsistency to admit the deposition of a witness (in which we can have no faith) to impeach her own testimony, when we would not admit the depositions of others to the same point, of the truth of which we had no doubt? That verdicts are gained or lost, and that damages are increased or diminished by perjury, daily experience teaches us is no unusual occurrence. But it seems to be an evil resulting from the imperfection of human nature, to which it is better to submit than to introduce a

practice calculated to extend the mischief which we would endeavour to prevent.

The granting of new trials depends much upon the discretion of the Court, and I can conceive a case so peculiarly circumstanced, as to authorize a departure from the general rule, by which we have heretofore been governed. But this does not appear to me to be a case of that description. The only material fact proved by this witness, which was not proved by any other (if, indeed it was material, of which I have great doubt) was the miscarriage. Now the existence of that fact was distinctly submitted to the Jury on the trial below; and from the general character of the witness, it is not unreasonable to suppose that the Jury entirely disregarded her testimony, But suppose they gave full credit to it, I cannot perceive that it must necessarily have enhanced the damages. The nature and extent of the injury were sufficiently shown by the other witnesses, and their testimony, without the evidence of this woman, might very well authorize the damages that were given. That such a beating might cause a miscarriage, no one perhaps can doubt, and whether it did produce that effect or not, to my view, was not vastly material in this case.

The admission of illegal evidence may be a good ground for a new trial, however immaterial it may appear to the Court, because it cannot be seen what importance the Jury attached to it. But the evidence in this case was not illegal, nor do we know that it was untrue. We have no reason, therefore to believe, that even if a different verdict should be given on another trial, greater justice would be done. If no illegal evidence has been admitted, if the verdict is consistent with the evidence which has been given, if we do not see that injustice has been done, nor a probability that greater justice will be done, there can be no ground for a new trial.

The last ground in this case, is a mere matter of form, and furnishes nothing for the consideration of the Court, which has not been already noticed.

The motion is therefore refused.

Justices *Bay*, *Colcock* and *Richardson*, concurred.

Justices *Johnson* and *Huger*, dissented on the sixth ground.

Gantt, for the motion.

Hunt, contra.



RICHARD CUNNINGHAM *ads.* THE CITY CORONER.

By the act of 1797, the Coroner is required to issue his warrant to a constable, to summon a jury of inquest; and where a juror is summoned by the Coroner in person, the summons is illegal.

The act of 1798 has not changed the manner of summoning jurors.

TRIED before the Inferior City Court, at Charleston, January Term, 1820.

The City Coroner in person summoned the defendant to appear at a certain time and place, to serve as a juror of inquest upon a dead body. He did not appear, in consequence of which, he was brought before a magistrate pursuant to the act of assembly to answer for his default. He defended himself on the ground, that the Coroner was not authorized by law to summon a jury of inquest in person, but must issue his process to a constable or other proper officer, and consequently, that the summons was illegal, and he was not bound to attend.

The magistrate decided against the defendant, and inflicted a fine of ten dollars imposed by the act.

From this decision there was an appeal to the Inferior City Court, when it was reversed, and an appeal was brought up to this court to reverse the decision of the Inferior City Court, on the following grounds :

1st.—That the Coroner had power at common law to summon a jury of inquest in person.

2d.—That this power is not taken away by the act of 1797, which declares, that he shall issue his warrant to a constable for that purpose.

3d.—That the decision of the Recorder is contrary to law.

Mr. Justice *Johnson* delivered the opinion of the Court.

It is unnecessary to enter into any enquiry as to the power which the Coroner had at common law to summon his own jury of inquest, as I think, it is regulated by our own acts of the legislature, at least so far as is necessary to the purposes of this case. I will remark, however, that the precedent of a warrant issued by the Coroner to his constable, to summon a jury of inquest, may be found in *Burns' Justice* (1 Vol. 532,) which proves, I think, that by the common law, this was the mode of summoning them. It is enacted by the act of 1797, (1 *Brev.* 187. 2 *Faust*, 150,) "That when and as soon as any Coroner shall be certified of the dead body of any person, supposed to have come to a violent and untimely death, found or lying within his county or precinct, he shall make out his warrant directed to all or any of the constables of the county or precinct where such dead body lies, requiring and commanding them forthwith to summon as many freholders of the county or precinct as shall be necessary to constitute a jury of twelve good and lawful men, to appear, &c." and imposes a penalty of ten dollars on "every person or persons summoned and warned to be a juror, and failing to appear accordingly." When the law imposes a duty on a citizen, and punishes the nonperformance of it, and has pointed out the process by which he is to be informed of what is required; on the principle that penal laws are to be strictly construed, that process cannot be dispensed with. This act requires, that the Coroner shall issue his warrant, directed to a constable, who shall summon the juror, and if he failed to attend, imposes the penalty. Instead of a process as required by this act, executed by the officer pointed out, the Coroner has substituted as far

as appears from the evidence in this case, his own verbal order (for it does not appear, that there was any warrant) and demands, that the defendant shall be punished; as well I think, might a judge supply the place of the clerk, sheriff, and all the other officers, his face for the seal of the court, and his *ipse dixit* for its process, so that whatever may be the powers of the Coroner, at common law, or even under the act itself, the penalty can only be inflicted when there has been a regular process executed by the proper officer.

It has been urged, however, that the subsequent act of 1798, (1 *Brev.* 188. 2 *Faust.* 216,) dispensed with the mode of summoning jurors. But it will be found on an examination of this act, it does not in the least interfere with the mode of summoning jurors, but makes all free white persons of the age of twenty-one years, as well by standers as others, liable to serve on the jury, and imposes the like penalty for their neglect or refusal; but neither changes nor dispenses with the mode of summoning, as pointed out by the act 1797.

I am therefore of opinion, that the motion ought to be dismissed.

Justices *Nott* and *Huger* concurred.

Justices *Bay*, and *Richardson* dissented.

Simons, for the motion.

Lancè, contra.



STATES GIST vs. JOSEPH COLE, Captain 31st Regiment
Militia, So. Ca.

Where property has been levied on by an execution, issued under the Patrol Law, it cannot be taken from the officer who has it in possession, by a writ of replevin.

THIS case came before the court, by way of an appeal from a decision which was made by Mr. Justice *Bay*, at

Chambers, on a motion to quash the above writ ; which motion was sustained, and the same was ordered to be set aside.

The circumstances which gave rise to the above proceedings are briefly the following, viz. *Mr. Gist*, the plaintiff in replevin, it appeared, had been fined by Captain *Cole*, an officer in the 31st Regiment of Militia, for divers defalcations, in not performing patrol duty, to the amount of about \$ 70; for recovery of which, Captain *Cole* issued his warrant under his hand and seal, pursuant to the directions of the 5th clause of the patrol act, by virtue of which, the sergeant or other military officer, charged with the service of the execution, levied upon a negro, the property of *Mr. Gist*, named *Stephen*, to satisfy the said fines and costs of the conviction. While the negro was in the possession of the officer under the levy, and before any sale could be made of him, to satisfy the said fines, the plaintiff sued out a writ of replevin to the sheriff of Charleston district, who took away the said negro by virtue thereof, out of the possession of the military officer aforesaid, and delivered him back into the possession of *Mr. Gist*.

The motion, therefore, at Chambers, was to set aside this writ of replevin as irregular and against law ; and for an order to the sheriff to restore the negro to the custody and possession of the officer, who had previously levied on him, for the purpose of raising and paying off the said fines.

Mr. Lance, on the part of Captain *Cole*, when the application was made to quash the writ, obtained a rule on *Mr. Gist* to show cause why the same should not be set aside.

Upon the return of which, *Mr. Toomer*, on the part of *Mr. Gist*, came forward agreeably to the rule, and contended, that this writ of replevin was regular and legal, and ought to be supported ; that it would lie for every unjust or unlawful taking of goods and chattels ; and that the present seizing and taking of the negro in question was one of that nature. He admitted, that several writs

of replevin had been lately set aside upon different grounds, yet he still insisted, that it would lay in other cases of an unlawful taking than for cases of distress, for rent in arrear. But what he principally relied upon was, that this case differed widely from all the late cases, in which this writ had been set aside for irregularity, and that it ought to form an exception to the rules by which the cases alluded to had been governed.

In the first place he observed, that it might well be compared to a warrant of distress from the commissioners of sewers, where goods had been taken by such warrant and replevied: And upon a motion in the King's Bench to quash the writ, the court refused it, but left the defendant in replevin, to put his objections on the record. (6 Bac. 56.)

Secondly—He urged, that this warrant might be considered as an execution issuing out of an inferior court, in which case, he said, if goods were taken, a writ of replevin would lie for them. For, he observed, there was a difference between an execution out of a superior and an inferior court; that it would be a contempt to issue a replevin for goods taken in execution by the former, whereas it was allowable in the latter. (*Gilb. Repl.* 154. 6 Bac. 56.)

Mr. Lance, in reply and in support of his motion, denied, that the writ of replevin would lie in any case, in this country, but in cases of distress, for rent in arrear. That this doctrine was very clearly laid down in 3 *Black. Com.* (146) which he said was supported and confirmed by all the elementary writers on the subject; that it had never been called in question by any of the English lawyers of the modern day; nor had it ever been in use in Carolina till the other day; since the publication of the Irish case mentioned in *Schoales and Lefroy, Rep.* 324. *Shannon vs. Shannon*. The law, he observed, had very wisely provided remedies by Trover, Detinue, and Trespass, for every injury done to personal property. To one or other of these remedies every man ought to have recourse

when he is injured. To apply the writ of replevin to those cases, he contended, was a perversion, and an abuse of the writ, for which it was never intended: And as to inferior jurisdictions the law had also wisely provided the writ of prohibition, at the threshold of every case, to restrain or confine them within their proper limits and bounds, so as to prevent vexation and oppression.

After hearing the counsel fully, on both sides, the Presiding Judge, being of opinion, that the writ of replevin would not lie in any case like the one under consideration, therefore ordered it to be quashed, and the negro levied on to be returned to the officer, who had made the levy on him to raise the fines.

From this decision, at Chambers, there was an appeal to this court, and the case was again argued by the same counsel, before a full bench, in January, where all the authorities and arguments, which had been offered on the original motion, were again urged by both parties for and against the decision.

Mr. Justice Bay delivered the opinion of the Court.

To the arguments and authorities adduced on the trial below, I have since given a more attentive consideration; and without going again into the general doctrine of replevin, which I formerly, and on so many occasions since, as well as before, have given to it, I shall confine myself to the exceptions relied upon by the counsel against the motion.

The first exception taken was, that the warrant in that case might be assimilated to that of the commissioners of sewers, when the kings bench, it is said, refused to give an order to quash the writ of replevin which had issued for the goods levied on in that case. I have examined the original report of the case referred to in 6 *Bac.* (56) and find, that the warrant of distress issued by the commissioners of sewers was for the rates of an assessment on lands in the country of Gloucester, amounting to 4*l.* 1*s.* 6*d.* for not repairing a sea wall, which they had caused to

be repaired, and for which the adjoining land was chargeable, in which case, it might well be considered as a rent charge. Upon a motion *in Banco Regis* to quash the replevin which had issued for the goods taken by virtue of the warrant, it was doubted whether it should be set aside or not, as it might be considered as a rent charge; in which case a distress would lay: And 2dly, because it was urged, that this assessment had not been made by the court of sewers, as authorized by act of parliament, but by some of the individual commissioners out of court, by their own authority. The court therefore refused to make any order upon the subject until they had the whole case before them. (*Pritchard vs. Stephens*, 6 D. & E. 522.) What became of the case finally, the reporters do not inform us. It commenced in doubt, and remains in uncertainty as far as we are informed; so that in fact and in truth, it proves nothing. At all events, however, it appears to me to have no bearing on a case like the one before us. In that case the land was chargeable for the assessment, if it had been regularly made, and the distress was the appropriate remedy for nonpayment, as much as for rent in arrear. Whereas in the present case, the fines were for the neglect of a personal duty, which *Mr. Gist* was bound to perform; so that in my opinion the cases are in no wise analogous to each other.

The second exception relied upon was, that this proceeding might be considered as one in an inferior court, in which case, it was contended, that replevin would lie for goods seized under its authority and jurisdiction. The counsel admitted, that an attachment of contempt would lie for issuing a replevin for goods taken in execution, issuing out of a superior court, but not out of an inferior jurisdiction; and for this purpose cited 6 Bac. (56) who relies on *Gilb. on Replevin* (154.) If such a doctrine was once to prevail in South-Carolina, and it was held to be the law, I have no hesitation in saying it would soon lay prostrate all the proceedings in all the inferior tribunals of justice in the state. No executions but those of the

court of chancery and the court of common pleas would be secure against this sweeping writ of replevin; and that too, at a time when the parties were upon the point of receiving the fruits of their judgments. All the executions out of the Inferior City Court, those issued by the different corporations for fines and forfeitures, commissioners of the high roads, and all the public bodies in the state, as well as those by magistrates or by the officers of militia for fines, &c. would all be paralyzed by the abuse of this writ, upon the principles contended for: For it would only be for the party whose goods are seized under the authority of any of those jurisdictions to issue his replevin, and get these goods delivered back to him; and then the other party must get them back again the best way he could. At all events, the party thus baffled and disappointed must go into the court of common pleas and avow the taking, and show, that all the proceedings were regular and agreeable to law; and even then the plaintiff in replevin would be entitled to his reply; and every case after the lengthy proceedings are made up and issue joined must go on the docket of the common pleas to be tried in regular order, and years would revolve about before these cases could finally be determined on. Thus a scene of confusion and delay would ensue, of which few men can well see the end. Fortunately however for the citizens of South-Carolina, this is, in my opinion, not the law. I acknowledge, that *Gilbert* has said so, and that *Bacon* has quoted him to that effect; but neither reason nor justice will bear him out in this position. For I lay it down to be sound law, as well as the wisest policy, to give to every jurisdiction created for the advancement of justice, and the good order and police of the state, all the specified powers and authorities with which they were invested; and there is no more reason or justice for calling in question or interrupting their proceedings while they act within the rules prescribed to them, than there is for calling in question the proceedings of the superior tribunals of justice. If however any of them should, at

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any time, transcend or exceed their limits and powers, a prohibition from one of the superior courts is the appropriate remedy, appointed by law for correcting or preventing any abuse.

It is argued in *Pangburn vs. Partridge*, (7 *Johnson's Rep.* 142,) that this position of *Gilbert*, "that replevin lies for goods taken in execution from an inferior court," is clearly erroneous, and that there are numerous cases to the contrary. In this opinion, I perfectly coincide; as the whole current of authorities in the books upon the subject are against it. It will not be denied, but that the supreme authority of Parliament in Great Britain, and of the Legislative body in South-Carolina, have an unquestionable authority to control the Common Law; and even in acts of Parliament themselves, it is a maxim that *leges posteriores priores abrogant*. Admitting, then, for argument sake, that such a principle as the one laid down in *Gilbert*, even existed, as a part of the Common Law, there can be no doubt but a positive act of the legislature would turn the scale against it; and that the statute law, from thenceforward, would become the law of the land.

There are no positive and express decisions or authorities in this country, in favor of the doctrine I am now advocating, because this principle of a replevin, laying in these cases, is a thing of yesterday; one of spurious growth, utterly unknown and unpractised in our country from its earliest institutions. But in England, the cases are numerous where it has been settled that this writ of replevin will not lie in any case for goods taken in execution, under the authority of an act of parliament, or any inferior jurisdiction. In *Bradshaw's case*, (T. 12 W. 3,) mentioned in 6 *Bac.* 55, and also by *Cunningham* in his *Law Dictionary*, it is laid down, that wherever an act of Parliament orders or directs a distress and sale of goods, it is in nature of an execution, and replevin does not lie for them. So it is laid down in 6 *Bac.* 56, that replevin does not lie for goods seized by a warrant from a justice of the peace, upon a conviction for the destruction of game, un-

der the authority of an act of Parliament; and that it would be considered as a contempt to issue it. In the case of *Rex vs. Oliver*, (*Bunb.* 14,) on a warrant of distress for a *land tax*, a replevin was considered a contempt. And so in like manner in the case of the *King vs. Monkhouse*, it was determined that replevin would not lie for goods distrained on a conviction for Deer stealing, under an act of Parliament, (*2 Str.* 1184;) and that an attachment should go against the under sheriff for serving it.

This brings me at last to the Patrol Law, which is a public act of South-Carolina, under which the warrant for seizing the negro in question was issued, and who has been replevied. This act may and ought to be considered as one of the safe guards of the people of South-Carolina, for the protection of their dwellings and habitations, and for the prevention of the unlawful assembling of a particular class of our population, and as a security against insurrection; a danger of such a nature, that it never can or ought to be lost sight of in the southern states. It may justly be considered as a branch of our Militia system; our grand national defence against foreign enemies, and for our internal tranquillity at home. It is easy, therefore, to see that summary and decisive powers ought to be vested in the hands of those who are charged with the execution of this important duty. The act in question, therefore, has given the necessary powers to the captains of the militia throughout the state; and has fixed and regulated the fines for all neglects and omissions of duty by those who are by law liable to perform it, and has authorized them to issue their warrants under their hands and seals, to seize and levy upon the goods and chattels of defaulters, to pay and satisfy the fines imposed for this neglect of duty. Here then is a plain and positive act of our legislature giving these full and express powers to our captains of the militia: and under the authority of one of them, and by virtue of his warrant, the negro *Stephen*, belonging to Mr. *Gist*, was levied on, and in the lawful possession of the officer charged with the execution of it,

when this writ of replevin was issued ; which brings this case immediately under the principles of the cases, in which it has been determined in England, that a writ of replevin will not lie in opposition to an act of parliament. I am therefore clearly of opinion, that the writ of replevin in this case was not warranted by law, and that it was an illegal interference with the proceedings and the authority given to one of our militia captains by the act of the legislature, and that the same should be quashed, or set aside, as null and void ; and further, that the negro *Stephen* should be delivered back to the military officer from whom he was taken by the sheriff of Charleston district, in order to raise the fines mentioned in *Captain Cole's* warrant.

Justices *Colcock, Nott, Richardson, Johnson* and *Huger*, concurred.

Toomer, for the motion.

Lance, contra.



JAMES PATTON, junr. vs. STATE BANK.

THE SAME vs. THE BANK OF SOUTH-CAROLINA.

An agent of the plaintiff cut a bank bill into two parts to transmit to the plaintiff by two different mails; one half of the bill arrived safely, but the corresponding half was stolen from the mail; the plaintiff then carried the half, in his possession, to the bank from whence it issued, and demanded the amount, but the bank refused to pay more than half the sum when only half the bill was produced: *Held*, that the plaintiff was entitled to recover the whole amount of the bill.

Cutting or severing a Bank Bill, destroys its negotiability.

THIS was an action of assumpsit, tried before the honorable the Recorder of the Inferior City Court of Charleston, May 1820; in which the jury found a special verdict in the following words :—" We find, that on the 10th of August, 1819, five halves of five bank bills of the bank of the defendants, payable to bearer, and amounting together

before they were cut, to the sum of one hundred and eighty dollars, the property of the plaintiff, were enclosed by the agent of the plaintiff, in a letter which was lodged in the post-office; at Salisbury, and directed to the plaintiff, at Philadelphia; that, on the 15th of the same month, the remaining halves of the said bills were forwarded to the plaintiff by mail, by the same person from the same place, and duly received by the plaintiff; but the five half bills enclosed and directed to him by mail as aforesaid, on the 10th of August, never reached the plaintiff, in consequence of the mail, in which they were, being robbed and the letter and said half bills feloniously taken away by persons unknown; that the plaintiff thereupon caused the said half bills, which came to his hands as aforesaid, to be shown and presented at the bank of defendants, in Charleston, and full payment of the whole to be demanded of defendants; he, the said plaintiff, offering at the same time to give a bond of indemnity to save the bank harmless from any future liability to any one on the five other halves of the said bills, which plaintiff had been thus deprived of; that the defendants refused to accept the indemnity offered, or to pay the half bills, as if they were whole; but offered according to the custom of the state banks in this city, which custom, we find, exists, to pay plaintiff ninety dollars, being the moiety of the whole five bills, which plaintiff refused to accept. Now if the court should be of opinion, that by law defendants were liable to pay the whole of the said five bills, upon the presentation of the said five half bills under the circumstances aforesaid, then we find for the plaintiff \$ 180, with interest from the time of the demand, and costs; but if on the contrary, the court should be of opinion, that the defendants were not bound to pay the whole unless the whole of the notes or bills were presented for payment, then we find for the defendants, with costs."

On this verdict judgment was awarded for the plaintiff, and a motion was made to reverse that judgment, on the ground, that the facts found entitled the defendants to a

judgment, half notes being negotiable under the custom established by the verdict at half their whole value.

The following opinion of the honorable Recorder, on the question made, accompanied the report :

“ In determining the question arising under the special verdict, I shall not consider the effect which might be produced by an indemnity being given to the defendants, nor shall I be influenced by the custom found to exist in the state bank, and bank of South-Carolina, of paying a moiety of the amount of a bill, when half of it is presented ; because I think, that this court cannot order or judge of an indemnity, neither can a verdict be given by the jury requiring the execution of such a condition ; nor is usage admissible to contradict or explain the meaning and import of a writing, the terms of which are unambiguous. The meaning of a bank note is to be elicited from its language : Its language is plain and not to be misunderstood ; its popular and technical import is the same ; it must therefore be governed by the rules which relate to similar instruments.

“ The sole question then remaining is, whether the defendants are bound to pay the whole amount of the bills declared upon under the circumstances found in the verdict, upon the presentment of the halves unaccompanied by any proof of the physical destruction of the other halves not produced ? The jury have found, that the halves not produced have been stolen by persons unknown ; as the court can intend nothing which is not contained in the verdict, the stolen halves must be regarded as being in existence.

“ On the part of the defendants it is contended, that the plaintiff cannot recover unless he exhibit the notes or prove their destruction, or show, that their negotiability has ceased ; and this appears to me to be a correct presentment of the case. If the negotiability of the missing halves be destroyed, so that the banks cannot twice be recurred to for their payment, they run no risk in paying their total amount to the plaintiff. It would therefore seem to be unreasonable, where the banks are absolved from this

responsibility, that the plaintiff admitted to be the *bona fide* owner of the bills before they were divided, should nevertheless not be able to recover their amount.

“ By the defendants it has been said, that a bank note is money; that in law it is regarded as such; and that there would be no more propriety in subjecting a bank to the payment of \$ 100 upon the production of half a note of that denomination than in compelling it to give a dollar or a doubloon upon the production of moities of these coins.

“ On the other hand, it is urged by the plaintiff, that a bank note is an acknowledgement of a debt due by the bank to the holder of it; that in its nature, it is not negotiable, and cannot be so rendered by the bank.

“ Both of these positions appear to me to be incorrect. It is true, that a bank bill is generally received as money; that it passes current as money, and that a tender in bank bills, in England, if not objected to, is a legal tender. But general practice and convenience will not change the nature of things. Notes of individuals, are frequently taken and passed away as money, but it will not be said they are so. It is requisite that a tender, if demanded, should be made in money; and yet an objection to bank notes is valid, for the sole reason, that they are not money. *Money*, (according to its legal import, in this country) *is coined metal, current for specified amounts, by the authority of the government.* A bank note is an evidence that a certain quantity of such coin is due to the holder of it; but the bill and money differ as much from each other, as a title does from an estate, or the power from the fruition. That a bank bill is an acknowledgment of a debt due to the holder of it, must be admitted, but an objection of this nature is perfectly consistent with negotiability, and bank notes are as much negotiable as any commercial instruments with which we are acquainted; and a right of property in them is as fully transferred by a delivery, as in a promissory note, payable to order, by an indorsement. Upon the face of its bill, a bank promises to pay the bear-

era certain sum upon demand; according to the contract, the bearer, when he asks for its payment, is bound to produce it. The general rule is, that a person making a demand, should accompany it with the evidence of the debt, for the debtor has a right to see his obligation cancelled, or to have it delivered to him, when he is called upon to discharge it. This is a rule applying to every species of obligation, but especially to a negotiable security, which may have been legally transferred to another, at the very time when the original payee makes his demand for payment. But to almost every general rule, there are exceptions. The books are full of cases, where a party may recover, who has lost the evidence of his claim, upon due proof of its having existed, of its contents, and of its loss. To this exception, there is again an exception, that a negotiable instrument is not included within it, because, if it were, a debtor might be twice obliged to discharge his debt. But if a negotiable promissory note, not indorsed, has been lost, as it is then divested of the nature of a negotiable paper, upon the proofs before mentioned, a suit can be maintained for its recovery. The same rule governs, if a negotiable instrument has been destroyed. (*Chitty*, 167, *Pierson vs. Hutchinson*. 2 *Camp. N. P. C.* 212.) Does not the case before us come within the reason and principle of these exceptions? The bills were negotiable when received by the plaintiff; they were then exclusively the property of the plaintiff; they have, by no act of his been transferred. Can the halves which are missing be rendered negotiable by any act of the plaintiff, or any other person? No property in the whole note can be vested in the possessor of the stolen halves; he could not produce the evidence of his right; he never had the whole notes; and excepting in certain instances, by which his case is not embraced, to give authority to demand payment of a note, the note must be exhibited. He could not prove the loss of the halves owned by the plaintiff; they are not lost: he could not prove a right of property in these halves; he

never had it : he could not even appear as the *prima facie* owner ; possession is necessary for that purpose.

“ Suppose, after the payment of these bills to the plaintiff, that the holder of the other halves should call upon the banks, and granting, which is very improbable, that he took the missing halves in the course of business, having given for them a valuable consideration, still he would hold them with notice, that the right to the amounts of them might be in the proprietor of the other halves, and he consequently would be bound by every defence which could legally or equitably be insisted upon against the finder or robber, because he would have accepted them under such circumstances as would necessarily set him up in an enquiry. The individual from whom the receiver of these halves obtained them, might be liable to him, but not the banks, whose notes he never had. If the drawer of a negotiable note, have notice before payment, that it is lost, and nevertheless pays it, he does so at his peril ; and if it turns out that the receiver of it had no title, the drawee will be liable to the real owner. (*Lovell vs. Martin*, 4 Taunt. 799.) This decision relates to a negotiable instrument, in which, as in the case of a bank bill, the right of property would be *prima facie* in the holder. If a bill be lost and found, the finder has no property in it against the owner, though he has against all other persons. (1 Salkeld, Evans's Edition, 126.) Now the finder or possessor of the notes in question, would be in the same situation as the finder of the bill in this case, and yet, he would have no right against the real owners, who are the plaintiffs, and who, by the finding of the Jury, have never transferred their property. There is a case in 3 Campbell's Nisi Prius Cases, 324, where the facts are similar to those before us, in which the determination was, that the original *bona fide* holder could not recover. The ground upon which Lord Ellenborough decides, is, that the half of the note, which had been stolen from the mail, might have immediately got into the hands

of a holder, for valuable consideration; and he would have as good a right of suit upon that, as the plaintiff upon the other half. I should speak with very great diffidence, when I said, for the reasons before expressed, that it does not seem to me that the conclusion of the English Judge is warranted by his premises, were I not sustained in this judgment by the decisions of two Judges of the Supreme Court of the United States, published in a newspaper, and in Niles' Register, (*a.*) which are in accordance with the the views I have taken.

"I am therefore of opinion; that the plaintiffs are entitled to recover from the defendants the full amount of the bills they have declared upon, together with interest from the periods of their respective demands."

Mr. Justice *Johnson* delivered the opinion of the Court.

The grounds on which this motion rests, have been so fully and ably considered in the learned opinion of the Judge who tried the cause, in whose conclusions the Court concur, that the expression of that concurrence is all that is left to the Court.

I will remark, however, on the question, as to the effect of cutting or severing the note or bill, on its negotiability, that the practice of cutting them for the purpose of transmitting them by different conveyances, had its origin unquestionably in an opinion, that it destroyed its negotiability. So far, therefore, as usage could have any influence as to the legal construction, it favors the conclusion that a severance of the note destroys its negotiability. But I am fully satisfied, that such is the legal effect, both on authority and principle.

The motion is discharged.

Justices *Bay*, *Nott* and *Richardson*, concurred.

Prioleau & Gadsden, for the motion.

Dunkin, contra.

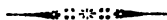
(a.)—*The following case, determined in the circuit court of the United States, for the district of Columbia, is, we presume, the one from Niles' Register, but we have not been able to find the other case alluded to by his honor the Recorder.*

R.

CHRISTOPHER ARMAT vs. THE UNION BANK OF GEORGETOWN.

THIS suit was brought for the recovery of \$ 100 from the Union bank. It appeared, from the case stated, that a note for \$ 100, belonging to the plaintiff, was cut in two, and was sent by two mails, for the purpose of being remitted with safety, from Gloucester, in Virginia, to Baltimore. One half of the note was received, and the other half never came to hand. On proof of the facts, the plaintiff applied to the bank for the payment of \$ 100, and offered to indemnify the bank against any claim that might be founded on the half of the note, when produced. The bank refused to pay the plaintiff more than fifty dollars; conceiving that they would be liable to pay by custom the other fifty, when the other part of the note was produced. 2 Campb. 211, was cited.

Per Cur : In this case, the note must be considered, by being severed, as destroyed. The half of a bank note is not a negotiable instrument, and could give no title to a *bona fide* holder, who received it after it was severed, to recover upon it. As it is admitted, that the plaintiff was the real owner of the note, when its negotiability ceased by being cut in two, he is entitled to recover the whole amount from the bank. Judgment for the plaintiff.—*Niles' Reg. Vol. 16, 360.*



SARAH FRAZIER vs. CHARLES DRAYTON.

The books of the owner of a ferry are admissible to prove an account for ferriage.—(a.)

Where several witnesses swore, that the rates of ferriage had been "fixed up in a conspicuous place," (agreeably to the act of 1798) at the plaintiff's ferry at different times, though they could not remember as to one particular portion of time, it is sufficient evidence to support a verdict for the plaintiff, in an action brought by him to recover ferriage.

THIS was an action to recover a sum of money due for ferriage, from the year 1802, to 1812, tried at Charleston, May Term, 1819.

To support the claim the plaintiff's books were introduced and were admitted to go to the jury as evidence.

They were proved in the usual manner by those who had made the entries ; and as to one who was dead, his hand writing was proven. It was proved, that the rates of ferryage had been at different times set up, though there was a portion of the time when the witnesses could not swear, that they recollected to have seen them up.

A verdict was found for the plaintiff, under the direction of the court ; and a motion is now made for a new trial, on the following grounds :

1st.—Because the books were not evidence under the act of 1721, to go to the Jury as evidence of the plaintiff's claim.

2d.—Because his honor erred in directing the jury in finding a verdict generally against defendant, for the whole of the plaintiff's demand.

Mr. Justice *Colcock* delivered the opinion of the Court.

It was contended on the part of the defendant, that the books of a ferryman ought not to be introduced, because they were not enumerated in the act of 1721, and had never before been admitted as evidence in any case. I was of opinion the question did not depend on the act ; for that is not of force, and has not regulated the decisions on the subject. The act recognizes the law or custom of giving in evidence the books of merchants, mechanics and handicraftsmen ; and declares, that they shall not be evidence beyond one year ; and the decisions in our courts have extended the principle to the books of physicians, and made them all evidence beyond the year. Now I am unable to see any reason why a ferryman's books, if regularly kept, should not be admitted in evidence as well as a physician's. Both charge for services performed, though of a different character. There is less room for imposition in the charges of a ferryman than in those of a physician. One can better remember how often he crosses a ferry, than how often a physician has visited his house, or distinguish between the visits of the friend and physician. And again, the charges of the

ferryman are fixed by law, those of the physician are not so limited.

When we advert to the reason on which merchant's books were admitted as evidence, that the goods are delivered without witnesses and by agents, I think it applies with peculiar force to a ferry owner, and with more than peculiar force to the case before us; for generally, they employ agents, and in this case, the owner being a lady, was obliged to employ one.

A majority of my brethren are of opinion, that the books were properly admitted.

The act of 1799, declares, "that every person or persons, their heirs or assigns, in whom public ferries, toll bridges or cause ways, have been or shall be vested by law, shall keep fixed up in some conspicuous place, the several rates, as are, or shall be established by law; and if any person or persons, their heirs or assigns, in whom public ferries, toll bridges or cause ways, have been, or shall hereafter be vested, shall neglect or refuse to keep fixed up; their several rates as established by law, such keeper or keepers of a public ferry, toll bridge or causeway, shall forfeit all such toll as they would have been entitled to receive." The object of this is manifestly to prevent imposition, and give the traveller an opportunity of guarding against it. In this case, the defendant lived very near this ferry, and that circumstance, together with his passing so long and frequently without paying his ferriage, well warrant the presumption, that he was perfectly acquainted with the rates of ferriage, and had entered into a contract to pass on credit. As to him, therefore, the protection of the law was unnecessary. But it was distinctly submitted to the Jury to decide the question of fact as to the rates having been posted up, for at least the greater part of the time; and it is the unanimous opinion of the Court, that there was sufficient evidence to support the verdict on this ground.

The motion is therefore rejected.

Justices Bay, Gantt, and Johnson, concurred.

(a.)—SAMUEL RICHARDS vs. ROBERT HOWARD.

CHARLESTON, JANUARY TERM, 1821.

A Printer's books are only evidence to prove the authority for advertising, but the file of newspapers must be produced to show the performance of the printing alleged to have been done.

THIS was an action brought by the plaintiff, as survivor of *Freneau*, against the defendant, to recover the amount of a printer's bill.

The cause was tried in the circuit court of Charleston, May Term, 1819; and the Presiding Judge permitted the original book of accounts kept by the plaintiff, to be given in evidence, to prove not only the authority to advertise, but the actual performance of the work.

The defendant contended, that the book of accounts was not the best evidence that the nature of the case would admit of, but that the orders for advertising and the file of papers ought to be produced, to show the authority to advertise and the performance of the work alleged to have been done.

A verdict was given for plaintiff; and a motion for a new trial was submitted on the following grounds:

1st.—That the book of accounts ought not to have been received as sufficient evidence of the authority of the defendant to advertise: And

2d.—That if they were sufficient to prove the authority to advertise, they were not sufficient to prove the performance of the work done, but that the file of papers ought to have been produced.

Mr. Justice *Huger* delivered the opinion of the Court.

The general rule of law prevents a party furnishing such entries in his favor, even in the case of a regular tradesman's books. (*Pitman vs. Maddox*, 2 Salkeld 690, and Bull N. P. 278.) Our courts however have permitted several exceptions to this rule; and it appears now to be fully established, that not only tradesmen's books, but mechanics' and printers' books, when regularly and properly kept, are to be received in evidence. In the case of *Thomas vs. Admor. of Best*, (1 Nott & M'Cord 186,) this doctrine is reviewed and reluctantly acquiesced in. As I do not feel myself at liberty to question the authority of this case, I must decide, that, on the first ground, the motion for a new trial must fail. But as the court, in the case of *Thomas* and the *Admor. of Best*, did not decide to what extent a printer's books were evidence, I feel myself at liberty to limit its operation, within the narrowest compass. I am of opinion, therefore, that such books are only evidence to prove the authority for advertising, and that in this case the file of papers ought to have been produced to show the performance of the printing alleged to have been done.

A new trial must therefore be granted.

Justices *Nott* and *Johnson* concurred.

Justices *Colcock* and *Richardson* dissented.

CITY COUNCIL vs. J. W. PAYNE.

The city guard of Charleston have the right to arrest persons committing affrays or breaches of the peace, without any warrant.

THIS was an appeal from a decision had before the Inferior City Court.

The report of the Recorder states, that "this was a prosecution for opposing the City Guard in the performance of their duty, under the 12th Sec. of the City Ordinance, for regulating the City Guard, passed 17th October, 1806. That Lieutenant *Fell*, of the City Guard, said, that about half past 2 o'clock, in the morning of the 4th of March, 1820, he heard a great noise in Meeting Street; that upon going to the spot, he saw two men, apparently drunk; that they were making a riot; were using very harsh language towards each other, and fighting; that the witness separated them, and told them they must go with him to the guard house; that he took one of the rioters into his own custody, and delivered the other to a sentinel; that the sentinel was stopped by the defendant, and another person with him; the defendant demanding the warrant of the guard, saying, without one, a citizen could not be arrested, unless found in the act of house breaking, stealing or committing murder; that the witness asked the defendant if he knew what he was doing, the defendant said yes; that defendant said the guard should not carry a white man to the guard house; that the witness told the defendant to desist from opposing him in his duty, and asked him if he would continue to do so; that the defendant said he would; the witness replied, if he opposed him when doing his duty, he would report the matter to the Council; the defendant then took the prisoner (*Turnbull*,) from the guard; the witness not choosing to make more resistance, as the defendant declared he would take the prisoner at the risk of his life; that whilst the witness had hold of one of the prisoners, the defendant seized the prisoner by the arm, called for assistance, and said that

he would prevent any man from being carried to the guard house, at the risk of his life.

"*George Granby*, a citizen, said he heard the defendant declare that the guard should not carry that man, meaning one of the prisoners, to the guard house ; and that the persons apprehended, were making a great noise.

"*Mr. Ripley* said, that he heard a person, whom he recognized as the defendant, say, that whilst he drew the breath of life, no guard should carry a citizen to the guard house.

"*Mr. Murray* said, pretty much to the same as *Mr. Ripley*.

"*Lewis Rogers*, (one of the guard,) heard the defendant say, it was a shame that a parcel of drilled men should carry a citizen to the guard house ; that they should not, and he would prevent them, if they were dragging a dog to the guard house.

"*Mr. Street*, a citizen, heard the defendant say, that no white man should be carried to the guard house ; that *Lieutenant Fell* asked the defendant, if he intended to molest the guard in the execution of their duty ; that the defendant replied yes, and wished he had arms.

"*Mr. Wm. C. Young*, (called by the defendant) said, that he was walking down the street with the defendant, when they heard some men call to them ; that they returned, when they saw a guard man, having a white man in his custody ; that the defendant asked the guard what he was going to do ; he replied, to carry the prisoner to the guard house ; that the defendant asked him if he had a warrant ; that *Lieutenant Fell* then came up, when the defendant asked him for his warrant ; the Lieutenant said his commission from the City Council was his warrant ; that defendant asked who created it ; the Lieutenant answered, the City Council, and that he was a peace officer of the city ; that the defendant said to the Lieutenant, will you give the man up ? the defendant then holding the prisoner, the Lieutenant said he could not ; that the Lieutenant then required the defendant to give up the prisoner ; to which

the defendant said no, unless you will show your warrant ; that the guard should not carry a white man to the guard house ; that the Lieutenant afterwards gave up the man to the defendant, saying that the defendant must be responsible for his conduct, as he would report him to the Council, and have the matter tried ; the witness added, that one of the men apprehended, was intoxicated, the other was not.

“ The defendant’s counsel contended, that the defendant could not be found guilty of the offence, with which he was charged, as the city guard had no authority to arrest the prisoner, who had been rescued ; that as the guard transgressed their powers in apprehending a citizen, under the circumstances stated, the taking him out of their custody could not be regarded as molesting them in the performance of their duty.

“ The Attorney-General read the 12th Sec. of the Ordinance of October, 1806, to show that the prisoners who were committing a breach of the peace, were liable to be arrested ; he contended that the guard were the peace officers of the city, having the powers of constables and watchmen ; that the City Council, under their act of Incorporation, had authority to appoint such officers ; and that under similar circumstances, a peace officer, or even a private individual, would have been authorized to arrest. He relied upon the act of Incorporation. 4 *Black. Com.* 144, and *Dalton’s Sheriff*.

“ I observed to the jury, that the City Council were authorized by the legislature to make such rules and ordinances as they considered requisite for the security, welfare and convenience of the city, and for preserving peace and good order within it ; that they were also empowered to appoint such officers as they should deem necessary to carry into execution their rules and ordinances ; that, under these provisions of their charter, they had constituted a city guard for the purpose of preserving the peace of the city, and had required the members of that body, among other duties to be performed by them,

to apprehend disturbers of the peace, committing noise, tumult, or riot; that it was evident, in this case, that the individuals apprehended, had disturbed the peace; that they were creating a tumult in the city; that the affray in which they were engaged, might have terminated in bloodshed or even murder; that, at a late hour of the night, such outcries could only be suppressed by the guard, as the ordinary civil magistrates could not then be resorted to, and that an ability to put a stop to such tumults was doubtless necessary to the tranquillity and peace of the citizens. But that, nevertheless, if the exercise of the authority of the City Council, through the interference of the guard, was inconsistent with the laws of the land, it could not be maintained by a court of justice; it was therefore incumbent upon me to express an opinion, whether the exercise of such an authority, in such a mode, was a violation of the laws of the state. From time immemorial, constables and watchmen had authority, without warrant, to arrest those whom they saw engaged in an affray or breach of the peace, and to detain them until they should find proper sureties. This practice was not only sanctioned by the common law, but by the usages, which I believe, prevailed in all the large cities of the union, without which, a populous town must frequently be subjected to scenes of violence and disorder. I regarded the city guard, who were peace officers of the city, in the light of watchmen and constables, as possessing the same powers as those officers; and thought, that an arrest by the guard, was no greater infringement of the rights of the citizen, than an arrest under similar circumstances by a constable or a watchman; that the arming of the guard did not render their authority less legal, it being well known, that they were armed for the purpose of inspiring terror among a certain class of our population; that if the guard exceeded their legitimate powers, they were as responsible as any other individual, for their acts; that in saying they might arrest, in certain instances, I did not mean to imply, that they might detain individuals

arrested, if bail should be directed to be taken; that an arrest might be legal and a detention illegal; but in this case, it was not necessary to consider any thing more than the legality of the arrest, which appeared to me to be the sole question to be decided.

“The jury found the defendant guilty.

“A notice was served upon me, that a new trial would be moved for, on the ground: That the court misdirected the jury, in advising them, that it was lawful for the city guard to arrest and confine white men in the manner prescribed by the city ordinance upon this subject.”

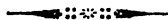
Mr. Justice *Gantt* delivered the opinion of the Court.

After the very able view which has been taken by the Recorder, of the nature of the offence of which the party rescued had been guilty, and of the propriety and legality of the power given to the city council, to cause such offenders against the safety and peace of the city to be arrested, it would be superfluous to add any thing in support of the opinions advanced in his report. As to the law of the case, the deductions drawn by him from the facts which the case presents, are considered as correct; and his opinion is adopted as the opinion of this court.

Justices *Richardson*, *Huger*, *Bay*, *Nott*, and *Johnson*, concurred.

Mauger & Elliott, for the motion.

Hayne, Attorney-General, contra.



D. W. HALL vs. LUTHER FREEMAN.

Where a demand has not been made on the maker of a promissory note, and the endorser, under a knowledge of this fact, agrees to pay it, a presentment to the drawer will be presumed, and it is unnecessary to prove it.—(a.)

THIS was an action of assumpsit, brought against the defendant, as the endorser of a note drawn by *Pepoon*.

Mr. *Montague*, a witness, for the plaintiff, said, that he called, at the request of the plaintiff, upon the defendant, on the day after the note became payable, and requested payment; that the defendant then promised to pay it and proposed to give his own note for a part of the amount; at the same time, observing to the witness, that he knew the drawer, *Pepoon*, was insolvent. The witness, on a subsequent part of the same day, again called upon the defendant, upon the same subject, when the defendant said, that he had ascertained, that the note was payable on the day before, but that he did not deal in catches; presumed he should call and discharge it. Upon being interrogated, the witness replied, that when he first called upon the defendant, from nothing which occurred, could he collect, that the defendant, at that time, knew, that the demand had been made upon him, on the day after the note was payable. The same witness further said, that he had never applied to the drawer for payment; and that both, the defendant and the drawer, lived near the plaintiff's residence.

The jury, under the direction of the judge, returned a verdict for the plaintiff.

A motion was made for a new trial, on the ground, that the indorser, when he promised to pay, did not know, that a demand had not been made upon the drawer; and that such demand ought to have been proved.

Mr. Justice *Huger* delivered the opinion of the Court.

In *Hopley and Dufresne*, (15 East. 275,) a presentation was not only not proved, but had not been legally made, and yet it was held, that in an action against the endorser, on a subsequent promise to pay, it ought to be left to the jury to determine, whether the defendant had notice at the time of his subsequent promise, that there had been no due presentation. And in *Lundie vs. Robertson*, (7 East 231,) when the endorsee, three months after the bill was due, demanded payment of the endorser, who said he had not had regular notice, but would pay it, and

no demand was proved to have been made upon the acceptor, though averred in the declaration; it was held, that every thing ought to be presumed against the defendant, in order to facilitate transactions of this nature; and it was presumed, that the bill had been regularly presented, and due notice given to the endorser; and that the subsequent promise to pay was an admission, that there existed no objection to the payment, and that every thing had been rightly done.

In this case the insolvency of the drawer was known to the endorser, as he confessed upon the first application made to him for payment. Between the first and second application for payment, he appears to have been investigating the circumstances of the case; for he said to the witness, *Montague*, on his second application for payment, that he had ascertained, that the note was payable the day before, but that he would pay the note. The presumption is, that he knew, when he made this promise, all the circumstances of the case, and if there had been no demand made on the drawer, he would have ascertained it. He was certainly aware, that he was not legally bound to pay the note from the want of notice, but he said he did not deal in catches. His promise to pay was absolute, and the presumption is, that there was a previous demand on the drawer, and it need not be proved.

The motion is dismissed.

Justices *Gantt* and *Johnson* concurred.

Mr. Justice *Richardson* dissented.

(*a.*)—See *Leffingwell & Pierpoint vs. White*, 1 John. Cas. 100. *Duryee vs. Dennison*, 5 John. Rep. 440. *Miller vs. Hackley*, 5 John. Rep. 375. *Peake's N. P. C.* 201. *Potter vs. Rayworth*, 13 East 417. *Hopes vs. Alder*, 6 East 16, *n.* And see the authorities collected in the note to *Lundie vs. Robertson*, 7 East 236, *Day's Ed* R.

JOHN TAYLOR vs. ISAAC TAYLOR.

Where a testator duly executes a will, which he permits to survive him, it will not be revoked by a subsequent will, which he has cancelled, or one not drawn *animo testandi*.

THIS was an appeal from the *Ordinary of Beaufort district*, before whom two testamentary papers were produced, each purporting to be the last will and testament of *William Taylor*, deceased.

The defendant was the principal legatee in both wills. But the plaintiff was only a legatee under the first. Other legatees were substituted for him in the second will.

The first will bore date in 1810, was signed by the testator, and subscribed by two witnesses. It was drawn by Mr. *John Riley*, one of the witnesses, at the request of the testator, when he was in health, and also at his particular request. It was kept by Mr. *Riley*, until the testator's death, which was in 1816. From the execution of this will to within a few days of his death, he constantly and repeatedly expressed his satisfaction therewith to *Riley* and others; but appears industriously to have concealed from the persons to be benefited by it, his having executed a will. He complained of the importunities of his brother, the defendant, about a will, and yet never disclosed to him, that a will had been made. The testator died about sun rise, on the 16th July, 1816. Three or four days before his death, he left the house of Mr. *Fity*, extremely ill, with the hope of reaching home; he was however obliged, by bad weather and ill health, to stop at the house of Mr. *Lyons*, who, on discovering his situation, proposed to him to make a will in favor of the plaintiff, his nephew, and then the defendant, his brother, to both of whom he objected, as he did to all his family. *Lyons*, who thought he ought to make a will, was not satisfied with this refusal; he persuaded Mr. *Bealer*, one of the legatees in the last will, and who happened to be at the house, to use his exertions to induce the testator to make a will. *Bealer* did so, and succeeded so far as to induce him to

send for a man by the name of *Smart*, to write a will. *Lyons* proposed to send for a lawyer. The testator said no, he would have only *Smart*, he was good enough for the purpose. *Smart* was accordingly sent for, and he soon made his appearance. He proceeded to draw a will. He read each sentence as he wrote it; the testator objected to his phraseology; did not like any "*palavering*," as he termed it; said he wished a "simple will." After repeated attempts, the testator appeared to be satisfied with the one which he signed, and which was subscribed by two witnesses. This was on Sunday. Before, however, *Smart* left the house that day, the testator appeared dissatisfied with the will; said it did not contain words limiting the distribution of his estate to a period, "*after his death*;" wished another drawn, to which *Smart* objected, saying that he was obliged to go to *Coosawhatchie* on business. On Monday morning, *Lyons* and *Smart*, the two subscribing witnesses to this will, went to *Coosawhatchie*. On their return, they found that the will executed the day before, had been cancelled by the testator; that he had himself torn his name from the instrument, and understood that he objected to it, because it did not contain the words, "*after my death*." At that time another will was exhibited, in the hand writing of the defendant, *Isaac Taylor*. It was precisely the words of the one drawn by *Smart*, excepting the words "*after my death*," which it contained. This will was read to the testator on Monday evening, once or twice; he was asked if he would execute it. He appeared to assent; he indicated his assent by the nod of the head, but muttered something about *male heirs*. He was lifted up to sign it; he said he could not, that he was too weak, but he would do so at some other time. *Lyons* then observed, that in all probability, he would never sign it, as his crisis was fast approaching. When the testator used the words, "*male heirs*," Colonel *M'Nish*, who was present, said, "I now know what he wishes, he wants to make such a will as *Graham* made," and proceeded to write such a

one. On reading it, however, to the testator, he expressed his dislike to it—said it had too much “*palavering*.” The testator died early the next morning without having signed the will. Mr. *Lyons* stated that he never heard the testator express any wish to have a will, but when he sent for *Smart*, that there were several persons about him on Monday evening, each of whom, in his turn, undertook to suggest to the testator, some mode of leaving his estate. This witness, on being asked whether he thought, from the conduct of the testator, he would have changed his mind, if he had lived a day longer, replied that he did not know what to think. It appears that the testator never divulged to any one at *Lyons*’s, that he had made a will. It appears that in the will of 1810, the words “after my death,” are not to be found.

The Ordinary admitted to probate the will of 1816, and rejected that of 1810.

The Circuit Court reversed the decree of the Ordinary, and an appeal from that decision was submitted to this Court, on the following grounds :

1st. Because the will of 1810, was revoked by the will drawn by *Smart*, although cancelled by the testator.

2d. Because the will drawn by *Isaac Taylor*, on the 15th July, 1816, was a valid and effectual will, and revoked that of 1810.

3d. Because, if the testamentary paper of 1816, be not good as a will, it is, notwithstanding, valid as a codicil.

Mr. Justice *Huger* delivered the opinion of the Court.

As a will is ambulatory and can have no effect until the death of the testator, it would seem to follow, that the testamentary paper, permitted by a testator to survive him, must be his will; until consummated by death, it is inoperative and ineffectual, and has no legal existence.

A testamentary paper duly executed and which is permitted to acquire a legal existence by the testator, will not be destroyed by a paper which does not exist, and whose

legal or operative existence was prevented by the voluntary act of the testator himself.

If two inconsistent wills be left by a testator, as they have both been consummated by his death, a question would arise as to their validity ; which is the last will, must be decided ; and here the dates are very important. But when only one testamentary paper survives, there can be no such question.

A testamentary paper purporting to be a devise of lands, and duly executed according to the statute, would not be revoked by a subsequent writing purporting to be a last will and testament, but which has not the statutory requisites. The last not having the *legal requisites* of a devise of lands would not repeal the first, which has the *legal requisites*.

So a will of chattels having no legal operation before death, if it survive not the testator, cannot repeal one which is permitted to survive. In *Goodwright vs. Glazier*, (4 Burr. P. 2512,) the court ruled, that a former will is not reversed by a subsequent will, which is cancelled ; and in *Harwood vs. Goodwright*, (1 Cowp. 91,) Lord Mansfield, in delivering the opinion of the court, says, "if a testator makes one will and does not destroy it, though he makes another at any time, virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good." And this case was, on appeal to the house of lords, affirmed.

Several cases, decided in the ecclesiastical courts of Great Britain, have been cited to show, that the rule laid down in *Harwood and Goodwright*, has not been universally admitted. In the case of *Moore vs. Moore* recently decided in the high court of delegates, a different rule appears to have prevailed. But these courts are governed by the civil not the common law ; and it appears, that the civil law rule is the reverse of that laid down in *Harwood and Goodwright*.

By the common law the first will is presumed to be restored to its active energy by the cancelling of the

second. By the civil law the first is regarded as annihilated by the second ; and it requires other evidence than a destruction of the second to revive the first. In both it is regarded as a question of intention, and may be controlled by other evidence.

I am best satisfied with the common law rule, and if I were not, I should not feel myself at liberty to violate the act of the legislature, which has made of force in this state the common law.

An attempt has been made to distinguish between wills affecting the *personalty*, and those affecting the *realty* ; I have been able to discover no foundation for this distinction. If it be a question of *intention*, the evidence which should satisfy the mind as to the *realty*, ought to be sufficient to satisfy the mind as to the *personalty*. The law is more regardful of the first than the last, and always requires stronger evidence of title.

It is said, however, that wills affecting the *personalty* are exclusively within the jurisdiction of the ecclesiastical courts of *England*, and therefore are governed by the civil law rule. But the court of ordinary in this state, is not an ecclesiastical court ; it is established by statute, and is governed by those rules which prevail in the common law courts, to which, there is a direct appeal given by statute, as is evidenced in this case.

But in this case, the intention of the testator has been manifested by unequivocal circumstances. The jury have found for the plaintiff on the ground, that the will drawn by *Smart*, as well as the one drawn by *Isaac Taylor*, were acquiesced in by the testator, to avoid importunity and not *animo testandi* ; and this conclusion was fully authorized by the evidence.

The motion therefore must be dismissed.

It will be understood, however, that the ordinary is not precluded from the consideration of any other objections to the will of 1810, than such as grew out of the will of 1816. He has decided that the will of 1810, should not be admitted to probate, because the will of 1816,

revoked it. In this he was wrong, and if no other objection can be made to the will of 1810, it ought to be admitted to probate; but if other objections exist, which is possible, though the court know of none, the ordinary is not precluded by this decision from an examination of such objections.

Motion is refused.

Justices *Bay*, *Nott*, and *Johnson*, concurred.



ST. AMAND vs. GERRY.

A. J. BROWN vs. SAME.

A plaintiff cannot entitle himself to an action, in a Court of limited jurisdiction, by releasing the interest, where the principal and interest would exceed it.—(a.)

ASSUMPSIT upon notes tried in the Inferior City Court.

The report of the Recorder, is, that “the plaintiffs in these cases, took verdicts for the principal sums due upon their causes of action, which were promissory notes, releasing their right to all interest. If the interest had been added, the verdicts would have exceeded the amount to which the Court had jurisdiction. I thought, under such circumstances, the plaintiffs might maintain their action; that interest was recoverable by way of damages, which damages a plaintiff might not choose to exact, and that the release precluded any future cause of action for the recovery of the interest. A notice was served upon me, that new trials would be moved for, upon the ground, that the plaintiff cannot abate interest on a note, to bring it within the jurisdiction of an inferior Court.”

Mr. Justice *Gantt* delivered the opinion of the Court.

In these cases, the Court are of opinion, that new trials should be granted.

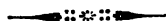
A plaintiff cannot entitle himself to an action in a Court

of limited jurisdiction, by releasing the interest, where the principal and interest would exceed it.

If payments are *bona fide*, made, and the sum is so reduced, as not to exceed the amount for which jurisdiction can be sustained, then a plaintiff may proceed to recover such balance; but the rule has been otherwise, with respect to a credit or a release, when done merely to bring the case within a limited jurisdiction. To preserve, therefore, uniformity of decisions, new trials must be allowed in the above cases.

Justices *Nott, Richardson and Huger*, concurred.

(a.)—See *Simpson vs. M'Million*, 1 *Nott & M'Cord*, 192, and Note B.
(a.)



JOHN H. DURANT vs. WILLIAM STAGGERS.

A succeeding Judge will not rescind an order made by a preceding Judge; but where a party thinks himself aggrieved by such order, the proper manner to procure redress is by appeal.

The court will not set aside a judgment obtained against a garnishee who fails to make a return, after a copy writ and a notice to make a return have been served upon him.

IN March Term, 1818, on application to the honorable Justice *Grimke*, who presided, leave was granted to the plaintiff in attachment, to cause a notice to be served upon the garnishee, requiring him to make his return to the attachment, on or before the sitting of the next court; and allowing to the plaintiff leave to file his declaration.

The garnishee having failed to make such return, a motion was made, Spring Term, 1820, for leave to enter up judgment against him. Mr. Justice *Gantt* who presided, allowed the plaintiff his motion.

An appeal has been taken and the grounds of appeal are,

1st.—That no notice was annexed to the copy writ originally served upon the defendant.

2d.—That Mr. Justice *Grimke* had, in 1818, refused to

quash the writ of attachment, notwithstanding this irregularity : And

Sd.—Because, in 1820, the then Presiding Judge had permitted judgment to go against the garnishee.

Mr. Justice *Gantt* delivered the opinion of the Court.

It was incumbent on the garnishee to have appealed from the decision made in March Term, 1818, if he had been dissatisfied with its correctness, but he acquiesced in it, and it is neither usual nor correct for a succeeding Judge to rescind the orders made by those who have preceded him. The proper and established practice is to appeal in such cases where the decisions made are supposed not conformable to law.

Here the garnishee had all that the attachment law required, a copy writ and notice to make his return ; and although the proceeding was not strictly conformable to the attachment act, yet it was substantially so ; and it is too late after so long an acquiescence in the first order, for the garnishee to complain.

The court are of opinion, that the decision of the Judge, allowing the plaintiff leave to enter up his judgment, was correct and legal ; and that the motion to reverse the same must fail.

Justices *Bay*, *Nott*, *Johnson*, and *Huger*, concurred.



MARGARET ULMER vs. HENRY ULMER.

A. received from B. a certain sum enclosed in a memorandum of articles to be purchased for him in Charleston : before A. left home, some property of his brother was levied on, and to redeem it he used the money of B. and his own : When A. reached town he sold his cotton and received the money for it, and as he was going to purchase the articles for the plaintiff, had the whole amount stolen from his pocket ; *Held*, that A. by applying the money of B. to his own use, became a debtor to B. for the amount, and was liable for it at all events.

THIS was a summary process to recover thirty dollars, for so much money had and received, to the use of plaintiff.

Richard Bryan proved, that defendant was about going to Charleston, and received fifty dollars from plaintiff, enclosed in memoranda of articles to be purchased for her, by him, which he had in his pocket book; that the same day they left home, some cotton belonging to a brother of defendant, was levied on by the sheriff, and to redeem that cotton, defendant paid the debt with the plaintiff's money and his own; that when he reached Charleston, the cotton was delivered to a factor; and defendant received a check for the amount of the money paid to the sheriff on account of the cotton; that this check was paid at the bank to defendant, who put the money in his pocket book, where he kept his own money; that defendant went afterwards to purchase the articles for the plaintiff; but his pocket book and all his money had been stolen, in the mean time from his pocket.

This was all the evidence, and the court gave a decree for defendant. From this decree the plaintiff appealed, and moved to reverse the same.

1st.—Because the defendant having applied the plaintiff's money to his own use or a different purpose than what he had undertaken; it created an implied promise, or personal obligation, on his part, to pay the amount, which the loss of his pocket book, and a different sum of money in no wise discharged.

2d.—Because the decree was contrary to law and the facts of the case.

Mr. Justice *Richardson* delivered the opinion of the Court.

By the act of receiving the money to be used for the plaintiff, the defendant received but a naked bailment, and was liable only for gross neglect; (*2 Strange 1099*,) but as soon as he used the money for his own purposes, by lending it to another, he became, if with the consent of the plaintiff, a borrower for use, and was then liable for slight negligence: (*Jacob's Law Dictionary 224.*) Or rather as the thing borrowed was current money, he became

voluntarily the debtor of the plaintiff, and must, like all others, discharge his debt so contracted, by simple borrowing. On the contrary, suppose, that the defendant, in the character of a mere depository, and liable for gross neglect only, of his own exclusive motion, used the deposit; then too, the exception out of the general rule, in his favor, is equally established, to wit: That the depository and pawnee, if they use the thing deposited or pawned, are answerable at all events. (*Fac. L. D. 225.*) And upon this latter supposition too, considering that the thing used was money, did not the defendant become simply a debtor for the amount he so expended? In any view it appears, that the money was beneficially used for the defendant; and though intended to be so used for the plaintiff too, the rule in such case of a bailment jointly beneficial, is, that the bailee is answerable for ordinary neglect, (*Fac. L. D. 224.*) though not for slight neglect; which latter would have rendered him liable, had the bailment been for the bailee's benefit exclusively. And it is laid down as one of the rules in the doctrine of bailment, that private stealth is presumptive proof of ordinary neglect. (*Fac. L. D. 224.*)

I may conclude then upon the rules applicable to the bailment of goods and chattels, that the defendant is liable.

But the most satisfactory is the view first taken, i. e. that having used the money with or without the consent of the plaintiff, the defendant became debtor for it. He placed himself in the situation of a factor or rather cashier who, having money in hands belonging to another person, but placed with such cashier to be kept generally or laid out for a particular purpose; and who, upon the implied consent of the owner, or of his own will, uses the money; knowing, that he can command as much when required; and the money being afterwards called for, borrows it, puts a large sum into his pocket, in order to return the amount used, and for other purposes, and then unfortunately loses the whole; whose money has this man lost? His own assuredly: His creditors and customers bear no part in his misfortune. And such must be the responsi-

bility of trustees and all cashiers who make use of deposits in their hands, else frauds would be too easily practised, especially where the deposit is of money.

Justices *Colcock, Bay*, and *Johnson*, concurred.

Martin, for the motion.

——— contra.



JAMES GRAHAM vs. MATTHEW ALLEN.

Where a rule is served on the Sheriff, for not making money on a *fi. fa.* he cannot defend himself by objecting to the manner in which the verdict against the defendant was recorded.

Where a defendant pleads *non est factum* to an arbitration bond, the amount of damages is not put in question.

THE plaintiff obtained a rule against the Sheriff to show cause why an attachment should not issue against him for not making the money under a writ of *fi. fa.*

It appeared that the action had been brought upon an arbitration bond, to which the plea of *non est factum* had been pleaded. The case went to the Jury on this issue, and they found a verdict for 10 cents. Judgment was entered up for the penalty of the bond, and execution taken out for the amount of the award made by the arbitrators. Two years, and upwards, had elapsed since the judgment had been entered up. The sheriff's having been instructed to that effect abstained from selling under the *fi. fa.* for a supposed irregularity in the proceedings.

The case came before Mr. Justice *Gantt*, in the Spring Term of 1820, for Georgetown district, and the rule was discharged.

The plaintiff appealed, and assigned for it, the following reasons :

1st. That it is not competent for a sheriff, when a rule is served upon him to defend himself by objecting to the manner in which the judgment against the defendant was recorded.

2d. After judgments have been acquiesced in, for several years, it has not been the practice of the courts to suffer them to be disturbed on account of any merely formal objections which may be urged against them.

Mr. Justice *Gantt* delivered the opinion of the Court.

On the hearing of this rule, I was of opinion, that as the record had been submitted to a Jury, and they had assessed ten cents damages, that the execution could not regularly have been taken out for a larger amount, but in this opinion, I am satisfied that I erred. A plaintiff is not bound to have the damages assessed before he takes out execution. The language of the act is, "he may," and the act also provides, that when the defendant shall deem it necessary, "he may" compel the plaintiff to submit the measure of damages to a Jury. In this case, the question of damages was not submitted to the Jury. The defendant did not, by his plea, deny that an award had been made. He only denied that the bond was his. The Court are unanimous, that the decision of the Presiding Judge should be set aside, and that the rule be made absolute, against the sheriff.

Justices *Nott*, *Johnson*, *Richardson* and *Huger*, concurred.



WM. N. THOMPSON vs. JACOB STEVENS.

Where a plaintiff commenced on action against the defendant for money which he had paid as security, to which the defendant plead the statute of limitations, *Held*, that the statute did not commence to run until the plaintiff paid the money for defendant.

The plaintiff was sued as security to a note, drawn by him and defendant, and separate judgments recovered against each; defendant paid up the judgment and his own costs, but not those of the plaintiff; the plaintiff sued for them, and produced a certificate of the attorney, (who died before the trial,) who had recovered the judgment against them, "that it appeared" plaintiff had paid his own costs: *Held*, that this was sufficient evidence that plaintiff had paid the costs, and to entitle him to recover the amount

Whenever a specified sum of money has been paid by one man for another, and the amount and time can be ascertained by any memorandum in writing, legally adduced to prove the transaction, interest can be recovered *ut semble*.

TRIED before Mr. Justice *Huger*, at Colleton district, April Term, 1820.

This was a summary process, brought to recover the amount of costs, say \$ 26 59, incurred, as was alleged by plaintiff, as the security of defendant, to a joint note given to *David Frier*, of which the following is, a copy, viz. "On or before the 25th December next, I promise to pay to Mr. *David Frier*, or order, the sum of one hundred and ten dollars, being for value received, this 19th March, 1806.

Witness,
DANIEL WALKER.

JACOB STEVENS,
WM. N. THOMPSON."

Judgments were obtained by *David Frier*, the payee of the note, against both *Stevens* and *Thompson*. The defendant, in the process, pleaded the general issue, and the Statute of Limitations, and also filed a discount. At the trial, the plaintiff produced the following certificate, to prove the payment of money by plaintiff, to the use of the defendant, and to take the case out of the Statute of Limitations.

" DAVID FRIER vs. WM. N. THOMPSON.

This was an action against Colonel *Thompson*, as security for *Jacob Stevens*.

Verdict,	-	-	-	127	55
Costs,	-	-	-	24	50
Renewal,	-	-	-	2	9
				—26	59
				—154	14

It appears that the debt and his own costs, were paid

by *Mr. Stevens*, but the costs against Colonel *Thompson*, as security, was paid by him.

GEORGE TAYLOR, *Plaintiff's Attorney.*

January 21, 1819."

The counsel for the defendant, objected to the adduction of this testimony, because, being a mere certificate of *Mr. Taylor*, he had no opportunity of cross examination, and because the certificate being no receipt for the costs, but only an acknowledgment of the former payment of costs to *Mr. Taylor*, was no such acknowledgment as should be admitted against the defendant, to take the case out of the Statute, and because the defendant could be bound by no acknowledgment of *Mr. Taylor*. The Court overruled the objections, and received the evidence. The plaintiff's counsel then produced the said joint note of plaintiff and defendant, to *David Frier*, to prove that plaintiff was the security of defendant, and further contended that *Frier's* judgment against *Thompson*, prevented the operation of the statute. The defendant's counsel objected, that this evidence was insufficient to establish the securityship without other testimony; and that *Frier's* Judgment vs. *Thompson*, could not prevent the operation of the statute as between *Thompson vs. Stevens*. *Mr. Taylor* died a day or two before the trial of the cause.

The court decreed for the plaintiff, for the whole amount of the claim, with interest from the date of *Mr. Taylor's* certificate.

An appeal was made upon the following grounds:

1st.—That *Mr. Taylor's* certificate was inadmissible evidence; but if admissible, insufficient to take the case out of the statute of limitations.

2d.—That there was no sufficient proof of plaintiff's securityship to defendant, in their joint note to *David Frier*, and no other testimony was adduced to prove it.

3d.—That interest could not be legally decreed upon plaintiff's claim, it being in the nature of an open account,

4th.—That the decree was in other respects contrary to law and evidence.

The opinion of the Court was delivered by Mr. Justice *Richardson*.

Upon the first ground, I am of opinion, that the statute of limitations did not commence running until the plaintiff had actually paid the money for which he was security. Until he had done so, what sum could he have recovered? Not the whole amount of the judgment merely because he might hereafter be required to discharge it, nor a part of it, for the same reason. At this stage, there was no more than a debt due by him for the defendant, as was the case when the note became due, but as yet he had paid nothing for his principal, and of course, had no claim to remuneration. His danger had been increased by the judgment, but he was still unhurt, and what damages could be assessed for the risk he ran? Any suit at law would then have been nugatory.

Whether *Taylor's* certificate was competent testimony to prove money paid by defendant, depends upon the construction placed upon it. To me it appears, that in as much as *Taylor* had been the attorney on record of *Frier*, and entitled to receive the costs, that his certificate would constitute a bar to the further recovery of the costs so certified to have been paid by the attorney, or the certificate may be construed to be a receipt for the costs by Mr. *Taylor*, and therefore are not only legal evidence, but like all receipts given by creditors or their proper agents to their debtors, the very highest evidence.

As to the third ground, I am of opinion that there was no proof, that the plaintiff had not been a principal in the note. His name being subscribed after that of the defendant, is entirely too vague. The principal sum being paid by *Stevens* is as unsatisfactory, and *Taylor's* certificate is altogether incompetent to satisfy this enquiry. Upon this ground then, I am of opinion, that a new trial should be granted; and the majority of the court have come to

the same conclusion, though perhaps not all upon the same grounds.

Upon the question of interest, I am of opinion, that wherever a specific sum of money has been paid by one man for another, and the amount and time can be ascertained by any memorandum in writing, legally adduced to prove the transaction, interest may be allowed. Upon the modern decisions, I might go farther and say, that wherever money has been laid out for the use of another, interest may be recovered. (1 *Binn.* 488. 1 *Dall.* 349. 1 *Ves.* 63. 2 *Bur.* 1077. 1 *H. Blk.* 305.) The certificate or receipt being then considered competent to show the money paid, interest would follow from the date.

The motion is granted.

Justices *Nott* and *Bay* concurred.

Mr. Justice *Johnson*, dissenting, delivered the following opinion :

I differ from the opinion of the court, on the first ground made in this case. It is admitted, that the statute of limitations would bar the plaintiff, if it commenced to run at the time judgment was obtained against him. The judgment fixed his liability, and he was not obliged to wait until it was enforced against him, to have a recovery over against the defendant, but might have instantly brought his action. At that time therefore the action in the language of the statute accrued to him, and the statute necessarily began to run. I admit, that if they had been jointly sued and a judgment entered up against them jointly, that the statute would not have commenced to run until the plaintiff had paid the money, but they were severally sued, and several judgments were entered up against them.

RICHARD WALL *ads.* THOMAS ROBSON.

A war suspends the operation of the Statute of Limitations, between the citizens of the two countries, for the time during which it continues.

THE brief states, that this was a case on a Summary Process, on a bill of exchange, for 14*l.* 5*s.* sterling, equal to \$ 63 27, drawn by *James Nesbit*, in favor of *Thomas Robson*, the plaintiff, (a British subject) on *Richard Wall*, an American citizen, residing in Charleston, and accepted by him. The bill was dated 2d March, 1812, payable at 30 days sight, accepted 25th April following, and protested for non-payment, on 28th May, 1812. On the 18th June, 1812, war was declared by the United States against Great Britain, and the treaty of peace was ratified between the two countries on the 17th February, 1815.

If the period, during which the war lasted, which was two years, six months and six days, be excluded from the computation of time, which the Statute of Limitation was to run, the five years mentioned in the act, will not have elapsed from the time the bill became due, till the 20th October, 1818, when the action was commenced. But if that period be included in the time, then, and in that case, the Statute of Limitations will be a bar to the action.

This case came before the City Court, in form of a special verdict, which submitted the point of law to the Recorder, whether, during the continuance of the war, the Statute of Limitation ran on the debt due a British subject or not? And he decided that it did not run on during that period, and gave judgment for the plaintiff.

The present is therefore an appeal from his decision.

Mr. Justice *Bay* delivered the opinion of the Court.

This case was very ably argued by the counsel on both sides, and a great number of authorities were produced upon the occasion. I have since considered the arguments and reviewed the authorities adduced, and am most clearly of opinion, that the decision of the Recorder was a

correct and legal one. I shall briefly give my reasons for this opinion, and quote the principal authorities on which I rely in favor of it.

At the threshold of this case, it is important to consider the nature and object of our Statute of Limitations. It appears to me, that the grand object of our Limitation Act, and indeed the object of similar acts in all countries where they exist, was to prevent old long standing and antiquated demands, from being raked up and brought forward against men after such a lapse of time, as it was reasonable to suppose all transactions had been finally settled between the parties. By the Common Law, there was no limitation of actions of any kind. But in England, by degrees, divers acts of Parliament were passed at different periods in the history of that country, for fixing and determining the time within which all actions, real and personal, were to be commenced or instituted. But one universal principle seems to pervade or run through the whole of them, namely, to prevent ancient claims from being set up and prosecuted after the original parties and all their witnesses were dead or removed into remote parts, beyond the reach of the courts of justice, or that there deeds and vouchers were lost or mislaid by time or accident, and particularly in money transactions, where it was fair to presume, the debts had been paid or satisfied. It was for these reasons, and to quiet men in the enjoyment of their estates and possessions, that these restrictive acts have been enacted, and more especially that our Limitation Act was passed. But it never could have been intended to prevent a man who had never been guilty of any wilful laches or delay; but who had been prevented by inevitable necessity from pursuing his just rights.

Having taken this concise view of the origin of our Limitation Act, I shall next proceed to consider what these causes or events are, which prevent a man from pursuing his legal remedy, and which appear to me to form exceptions to the operation of these acts, and indeed of all municipal laws and regulations whatever. And these I

take to be two: 1st. The act of *God*. 2d. Enemies in war.

The act of *God*, to which the destinies of man must submit, and over which human laws can have no control, then forms the first grand exception to the operation of all legislative acts, and is so broad and extensive in itself as to include within the range of its operations, all the storms, tempests, earthquakes, and other casualties of nature. Whenever they happen they form marked exceptions to all human institutions. If a master of a ship who is bound by law to carry and deliver goods in safety, is overtaken by a storm or tempest at sea, is obliged to throw over a part of the cargo to save his own life, and the lives of others on board, this will exempt him from any responsibility for damages to the owner. So if a common carrier who is bound to carry goods safely at all events, is in like manner overtaken by a storm or tempest, whereby the goods are lost, it shall excuse him. So if a house be destroyed by fire in the course of a dreadful conflagration occasioned by lightning or by an earthquake, which, a tenant is bound to keep in repair and to deliver up in good order; this shall release him from his covenant. I only mention these few instances, as illustrative of the subject under consideration; and which I find confirmed by the best common law writers and authorities. In *Plowden*, which was quoted in the argument, this doctrine is very fully laid down and illustrated. In page 9, he says, "In our law, as well as in all other laws, there are some things that happen which cannot be prevented by any foresight or possible diligence, or avoided by any means whatever; and when any such thing happens to a man, the law will not punish him for it; for the law will not punish a man but for his own default, and if the law sees no default in him it will not punish him; for, if the law should punish a man for an accident, which, by no foresight or diligence, could possibly be avoided, it would be utterly against reason, and therefore seeing that such accidents can by no means be avoided, the person upon whom they happen

shall not be hurt or injured thereby." This very able and excellent commentator then goes on and adds, "there are three kinds of laws by which the people are governed, viz. the general law, customs and statute law, and in these three laws such unavoidable accidents shall not hurt any one," for which reason, he says, "though the effusion of blood and killing a man is prohibited by the common law, yet, every man may kill another in his own defence." "So by the common custom of the realm as hosts shall be charged for the goods of their guests lost or stolen, yet, if their houses be broken by the king's enemies and the goods be taken from thence, they shall not be chargeable for them, by reason, that such violence cannot be resisted, and so like reason will dispense with the statute law, and this from the necessity of the matter." *Plowden* then instances the case of a ship on fire, storms and tempests at sea, and throwing goods over board to save the lives of passengers, and which I have before observed upon. All these instances, and many more which might be examined and enumerated, will excuse or prevent the ordinary operation both of the common and statute law whenever they happen, and may be considered as forming exceptions out of the general principles of all laws, as *Plowden* very fully and justly observes. If I was to search volumes, I could find nothing more conclusive on the subject, than the reasoning of this wise and able old common law commentator; and there is nothing in modern writers to contradict him, but on the contrary, they all bow down to and respect him.

Secondly, enemies in war. Under the foregoing head, I have considered the exceptions to the operation of municipal laws by the act of God. I now proceed to consider the 2d general exemption from the casualties of war. *Vattel* lays it down in *Lib. 3, chap. 1, sec. 1, p. 267*, that "war is that state in which a nation prosecutes its rights by force of arms." In *sec. 4, p. 439*, he lays it down, that private individuals have no hand in the declaration. "A right so dangerous and important can only be entrusted to the

supreme authority of the country alone." It is therefore one of those events or casualties which individuals cannot prevent, and over which they can have no more control than they can have over the elements we have just been considering. He then proceeds, "formerly, wars were carried on with great rigour and every thing found in the country belonging to an enemy or the subjects of an enemy, was confiscated to the state; even debts due from the subjects of a state at war, to those opposed in war, were confiscated also, but at present they are carried on with more moderation and indulgence, especially since the introduction of commerce among the European nations, and consequently, all the sovereign nations of Europe have departed from this rigor; and as this custom has been generally received, he who should now act contrary to it, would injure the public faith;" for he adds, "strangers trusted his subjects only from the firm persuasion, that this general custom would be observed. States do not so much as touch the sum which it owes the enemy. Every where in case of war, funds credited to the public, are exempted from confiscation and seizure." *Vattel, Lib. 3, chap. 5, sec. 76, 77, p. 298.* So far with regard to the law of nations. Corresponding with these principles of national law, Lord Coke lays it down as a part of the common law, that there is a distinction between an alien friend and an alien enemy. That an alien enemy shall not maintain either real or personal actions, until both nations are at peace; but an alien friend at peace may maintain personal actions; for an alien friend may trade and traffic, buy and sell, and therefore of necessity, he must be of ability to have and support personal actions; but he cannot maintain real actions, as he cannot hold lands. (*Co. Litt. sec. 198, p. 129.*) Again, when the courts of justice are open, and the judges and ministers of the same may by law protect men from wrong and violence and distribute justice to all, it is time of peace; but when by invasion, insurrection, rebellion or the like, the peaceable course of justice is disturbed or stopped up so that the courts of justice are

shut, "*et silent leges inter arma*," then it is a time of war. (*Co. Litt. sec. 412, p. 249.*) So careful therefore is the law of the rights of men, that if a man be disseized in time of peace and the descent is cast in time of war, this shall not take away the right of entry of the disseisee. (*Co. Litt. 412.*) From the foregoing principles laid down by Lord *Coke*, it appears, that the common law recognizes the civil law, and they both coincide and harmonize upon this important subject, namely, that in time of war no action can be maintained by an alien enemy; but upon the return of peace, all the friendly relations between the subjects and citizens of the two countries are restored, and their rights may be mutually prosecuted in the courts of justice in either country respectively, without hindrance or interruption. And the reason given for not permitting an alien enemy in time of war, is a good one, as it might have a tendency to draw the resources out of the country, and the better enable or aid the opposite party to carry on the war on his part. War then does not deprive the individual, in an enemy's country, of his right or demand; it only suspends it until the courts of justice are open to enable him to recover it. The privilege of commerce has secured this right to the subjects of all nations; and the state which should refuse this right at the present day would not deserve to be ranked among those of the civilized world. Upon the return therefore of the day of peace all those rights recommence which had lain dormant or had been suspended during the period of war. A contrary doctrine would enable every debtor in a country lately restored to peace, where there had been commercial dealings before the war, to cheat and defraud his just and *bona fide* creditors, as was very well observed in the argument, since every nation in its political capacity disdains or disclaims every idea of confiscating commercial debts to its own use. If then it is clear and evident both by the common law and the law or courtesy of nations, that there is no national principle existing to bar or prevent an alien in a foreign country from recov-

ering a just debt after the restoration of peace, shall it be said or allowed, that any municipal regulation of one of the states shall have that effect, where the general law of nations and those of foreign commerce say the contrary? I very much question the power or authority of any state or nation, at this enlightened period of the world, to pass such a law, if they were disposed to do such an act of injustice.

But it is said, our Statute of Limitations will have that effect, which brings me to consider—3dly, the nature and operation of that act. I have already given my ideas of the general nature and design of the statutes of Limitations wherever they have prevailed. I shall now confine myself more particularly to our Limitation Act of 1712. (*2 Brev. Dig.* 21.) And here I would observe, that I consider it as a mere municipal regulation, founded on local policy, which can have no force or bearing abroad, and with which foreign or independent governments have no concern. But it has been contended, that when it once begins to run, it must run on, notwithstanding any subsequent disability, till it runs out, and this too, as well against foreigners, as our own citizens, and as well during war, as in peace. I admit that it is in general, a good rule, but to every general rule, there are exceptions arising from necessity or causes beyond the reach or control of municipal regulations. The intent and meaning of the above general rule, when confined to its true and proper limits, I take to be this, as every general rule ought to be founded on right and reason, that where the laws of the country afford a redress for every injury, and recovery of every just right, and the courts of justice are open to administer redress, the party entitled to a remedy, or to a just demand, who will not pursue it within the times mentioned in the act, and use that diligence which the law requires of him for the recovery of it, in such cases, the statute once beginning to run, shall run on until the party is barred of the right or remedy, and any other construction of the rule, would, in my opinion be subversive of every princi-

ple of justice. For it surely will never be contended that municipal regulations, or local statutes can control the destinies of nations, or deprive the citizens of a belligerent of rights they were entitled to before the declaration of war. Is it not more consistent with reason and justice, that such rights should remain suspended, till the storm of war shall end, and peace once more smile upon, and bless contending nations? No rational mind can refuse its assent to the affirmative of this proposition. War, it is admitted on all sides, cuts off all friendly intercourse between the citizens and subjects of contending nations, and shuts up the courts of justice against the demands of each other, however numerous and great the credits or creditors may be. It is an event that the creditors could not control, and over which they had no power. There is no default in them. It is one of those things which *Plowden* says could not be avoided by foresight or diligence; and when such things happen, the law will not punish a man for it; for if the law should punish a man for an accident, or for an event, which by no foresight or diligence could be avoided, it would be utterly against reason. Now to apply these principles and the force of this reasoning to the case immediately under consideration, the Law of Nations, not only permits, but favors foreign commerce; and the courtesy of nations permits and allows contracts for merchandize; and as a natural consequence, the right of recovering debts. For example, a man in South-Carolina, contracts a debt with a merchant in England, and imports his merchandise in good order, and in due time, agreeably to order. Within one month after this contract is made, war is declared between Great Britain and America, (and lasts, we will suppose, for five years, the time mentioned in the act,) at the end of these five years, peace is restored; and the merchant in England calls upon his debtor in South-Carolina for his money; no says the debtor, we have a statute in force in South-Carolina, which says, all debts, not sued for within five years, shall be for ever barred; that this stat-

romantic to be indulged for a single moment. But to go one step further, and the more immediately to apply *Plotuden's* rule; suppose for a moment it were possible to call up the members of the Legislature of 1712, from their slumbers in the tomb, and that they were present, and asked *Plotuden's* question, did you intend that the Statute of Limitations, you have just passed, should bar foreign merchants of their actions for just debts, where they have been prevented by war from bringing suits for the recovery of them? I presume there is no man who hears the question asked, would hesitate a moment in concluding, that the answer would be *una voce*, we had no such intention. It was only designed as a municipal regulation among the inhabitants of this province, at the time, and never was intended to bar the rights of foreign creditors from the recovery of their debts.

But granting the utmost that was contended for, that it was intended to bar foreigners as well as citizens after the limited time mentioned in the act, from maintaining suits at law, will not the declaration of war suspend the operation of the act? especially, as it was an event that the legislature of 1712, could not have foreseen or guarded against, or indeed if it could have been foreseen, it did not lay with a colonial legislature to have regulated commerce or commercial rights; that was a subject for the consideration of parliament, the supreme legislature of the empire. We have already determined, that one of the clauses in the executors law of 1789, suspended the operation of the limitation act; as it prevented a man from suing an executor until after the expiration of nine months from the death of the testator, although there are no express words in the executor's law to that effect. Now there is no doubt in my mind, but that the act of congress of June 1812, which is the supreme law of the land, declaring war against Great Britain, is perfectly analogous to the executor's law in this respect; for by its operation it prevented British subjects from suing during the war, and consequently was as much a suspension of the limitation act as

express words could have made it ; for by the act of war, our courts of justice were shut up against British creditors, as effectually as they were during the nine months by the executor's law against our own citizens. So covenants are repealed or extinguished by acts of parliament, as where A. covenants not to do any thing, which it was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if A. covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, it in like manner repeals the covenant. (*Brewster vs. Kitchell*, Salk. 198, 5 Co. 7. 2 Bac. 80.) Now it is evident that privilege allowed to aliens to bring suits for recovery of debts amounts to a covenant on the part of the state, that it shall be lawful for them so to do. And the language of the limitation act is, that they shall do so within five years. But if an act of congress, which is a paramount act, comes in and says, they shall not maintain any suit during time of war, which the declaration of war proclaims to the world, surely this amounts to a repeal or suspension of the limitation act, (which calls upon them to bring suit within five years) as long as the war lasts, as effectually as an act of parliament repeals or suspends a covenant solemnly made and entered into under the hand and seal of the party. To give it any other construction would be the extreme of injustice ; contrary to all the principles of reason and equity laid down by *Plowden*, Lord *Coke* and the other authorities quoted. But by giving this construction to the act, the rigor and severity of the text of the law is softened : it is reconciled to reason and justice, and the rights of innocent individuals abroad, who reposed faith in the laws of our country, are preserved and protected by it. Courts of equity have likewise given this reasonable construction to the act of limitations ; for it has been determined, that if the statute of limitations attaches upon a demand pending a suit in equity, the court would take care to preserve the plaintiff's right and would not suffer the statute of limitations to be pleaded

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N. B.—The names of the *J. J.* who concurred in, and dissented from, the above opinion, are not inserted in the copy furnished us; but we hope to obtain them, ere long, to insert them on the last page of this volume. R.

CONSTITUTIONAL COURT

OF

South-Carolina, November Term, 1820—Columbia.

JUSTICES PRESENT THIS TERM.

CHARLES J. COLCOCK,	RICHARD GANTT,
ABRAHAM NOTT,	JOHN S. RICHARDSON.
DAVID JOHNSON,	DANIEL E. HUGER.

GEORGE SAWYER *ads.* JOHN H. EIFERT.

Words are to be construed by a court and jury in the same manner as they were or ought to be construed or understood, by the person to whom they were spoken.

A person may convey a charge of felony as well by way of question as by direct allegation, and must always be a question of construction, whether such is his meaning or not.

In an action of slander, evidence of the plaintiff's *general* bad character is admissible in mitigation of damages; but evidence of a particular crime of a distinct character from that with which he is charged, committed by the plaintiff, is inadmissible.

THIS was an action of slander, tried before Mr. Justice *Huger*, at Granby, Fall Term, 1820, for charging the plaintiff with having stolen iron and steel from the defendant. In one count of the declaration, the defendant is charged with having spoken the words by way of interrogation, and in the other of having accused him directly with the felony. The words were proved to have been spoken interrogatively.

And when the plaintiff had closed his testimony, the defendant moved for a nonsuit on the ground, that the words proved were not actionable. That motion was overruled.

The defendant then moved for leave to give in evidence the general character of the plaintiff, by way of mitigation of damages. That motion was also overruled.

He then moved to give in evidence the record of his conviction for perjury, and that was also refused, and the plaintiff obtained a verdict.

This was a motion for a nonsuit or new trial, on the following grounds :

1st.—Because the words proved were not actionable.

2d.—Because the Presiding Judge refused to let the evidence, which was offered, go to the jury.

Mr. Justice *Nott* delivered the opinion of the Court.

It is now very well settled, that words are to be construed by a court and jury in the same manner as they were or ought to have been understood or construed by the person to whom they were spoken. A person may convey a charge of felony as well by way of question as by a direct allegation. And it must always be a question of construction, whether such is his meaning or not. The question was therefore properly referred to the jury, and the motion for a nonsuit must be refused.

The motion for a new trial admits of two questions :

1st.—Whether the defendant ought to have been permitted to give the general character of the plaintiff in evidence, by way of mitigation?

2d.—Whether he ought to have been permitted to give evidence of a particular crime committed by him, of a distinct character from that with which he was charged?

The first question appears to me to be settled in the case of *Buford* *ads. M'Cluney*, (4 *Nott & M'Cord* 268,) and on grounds perfectly satisfactory to my mind. There can be nothing more unreasonable than, that a person, who by a long course of vice has proved himself to be so destitute of every moral principle as to be capable of committing any crime, should be entitled to recover the same damages in an action of slander as a person of spotless fame, merely because he has not acquired any general character,

with regard to the particular crime, of which he has been accused. It is within our daily experience, that there are persons in every community, so destitute of character, or rather, so notorious for their bad characters, as to furnish good grounds of belief, that they are capable of committing many offences; of which they may never have been accused, and for which they may not have acquired any particular character. Suppose a person who had been guilty of felony and robbery; until his personal safety rendered it necessary that he should banish himself from society, should live in the woods and support himself by rapine and plunder. Would any one hesitate to believe, if such a person should be accused of committing a rape, or of swearing falsely, that he was bad enough to do either, yet, in an action of slander for such a charge, if the testimony was restricted to the character of the person with regard to those particular crimes, the defendant would probably fail in his proof. But I will illustrate the principle by another case, which I believe does not unfrequently occur. There are, in every community, men who, from long habits of drunkenness, rioting, swindling, stealing and associating with rogues and felons, are considered fit instruments for the perpetration of any crime. Should such an one be brought into court as a witness, to establish the innocence of a man as bad as himself, perhaps an accomplice, might not any one believe that he had committed perjury. In an action of slander for such a charge, might not his general character be proved by way of mitigation, though he had never been sworn in a court of justice before, and therefore never could have been suspected of such a crime? I think it is a question, respecting which, we ought not to hesitate, and it appears to me that the law which has been cited to prove the contrary, establishes the principle. Mr. *Starkie*, in his treatise on Slander, says, "a man of bad character, is not to be represented as worse than he really is, and therefore is entitled to a compensation to be measured by the excess, beyond what is due to him," (299, cited in *Buford & M'Chune*, 1

Nott & M^cCord, 272.) What does he mean by saying that the compensation is to be measured by the excess beyond what is due to him, if the defendant be not permitted to investigate his character to ascertain how far the charge has exceeded the truth. It is to be observed that this opinion only goes to allow the general character to be given in evidence; but not particular traits in his character different from that charged. It is true, the party whose character is thus attacked, may require the witness to give the reasons and grounds of his opinion, and this may lead to evidence of particular facts. But that is for the benefit of the plaintiff, who, if he will require his character to be particularly investigated, must suffer the materials of which it is composed, to be examined. And if when his whole character is before the jury, they think it to be so bad, that it cannot be injured, they will and ought to give only nominal damages. But if the defendant fails in that part of his defence, the plaintiff will have the benefit of it.

It is asked, if the plaintiff has a right, on his cross examination, to reduce the questions down to the particular instances in which his character is vulnerable, for what purpose will you go into an investigation of his general character at all? The reason is obvious. If the defendant succeeds in establishing the general character, he so far succeeds in the object of his defence. But his attempting to do so, will not preclude the plaintiff from disproving the fact. Proving a particular defect in the character of the plaintiff, will not necessarily operate as a mitigation of the defendant's offence. It will be a matter for the consideration of the Jury, and may often produce a contrary effect.

2d. After these observations, it would seem that little need be said on the second question. The evidence offered of a particular crime was properly rejected. A person cannot be supposed prepared to answer evidence of any particular offence. Besides, the fact that a man has committed one crime, does not furnish any excuse for a person maliciously and without any cause of suspicion, to charge him with another. It is only where the character

is so bad, as to furnish the grounds of belief that he is capable of committing any crime, that such evidence is to be allowed. It is true, the extent of the proof cannot be seen until it is heard. It then becomes a question of fact for the Jury, who will give it the weight to which it is entitled, and no more.

The opinion of the court, in the case of *Buford and M'Cluney*, was delivered by myself, and if there is anything in that opinion which authorizes the inference, that a person may say before a tribunal of justices, "I did utter the slanderous words charged, they are not true, I never heard it uttered by human tongue, that the party was guilty of the crime they express; the charge arose in the wantonness of my imagination, and was uttered in the maliciousness of my heart, but I am not liable to damages, because the plaintiff is not a man of good general character," I have been most unfortunate in my manner of expression: Or if I have conveyed an idea that the real injury done to the character of a person should be the only rule for estimating the damages, or that the defendant may plead the general character of the plaintiff, in justification of a groundless and malicious slander, I have been equally unfortunate. And I avail myself of this opportunity to remove the impression. I admit that a person of bad character may be unjustly slandered, and may be entitled to heavy damages for such slander. But I hold, that good character, either general or special, is the substratum of every action of slander, and that a Jury in estimating the damages, should have a regard, as well to the character of the plaintiff, as to the malice of the defendant. And that a woman ought not to be taken from the stews and brothels of a town, to be placed along side of the most respectable ladies, who equally adorn our drawing rooms and our churches. Nor that the high priest of vice and corruption should be ranked with the pious Priest of the Parish, or the respectable Bishop of the Diocess. Where a person's character is such, that he cannot safely trust it to a Court and Jury, slander can do him but little injury.

And a person who is neither ashamed nor afraid to expose his character to the eye of the public, ought not to be permitted to shelter it under the forms of law from the eye of a Jury.

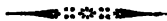
I am of opinion that a new trial ought to be granted on the ground, that the evidence of general character was refused.

Justices *Colcock* and *Richardson*, concurred.

Justice *Gantt*, dissented.

Bausket, for the motion.

A. P. Butler, contra.



JOHN F. WALLACE vs. ISAAC FRAZIER.

Where a vendor gives a written warranty of soundness of a negro, which afterwards is found to be unsound, it is immaterial whether the vendee knew of the unsoundness or not; it is a mere matter of contract, and the vendee is entitled to recover the difference between the value of the negro, if sound, and his actual deterioration by the unsoundness.

Where a warranty of the soundness of a negro is given, which afterwards proved to be injured from 25 to 50 per cent by disease, and the jury give mere nominal damages, a new trial will be awarded.—(a.)

THIS was an action of assumpsit, tried at Columbia, Spring Term, 1820, on an express written warranty of the soundness of a negro.

The plaintiff proved the sale, the warranty, and the unsoundness.

The defendant then offered testimony to prove, that the plaintiff was apprised of the unsoundness when he purchased; that testimony was objected to by the plaintiff's counsel, but was admitted by the court. It then appeared by the evidence, that the negro had a sore on his leg, which was represented to be of recent origin, and from its external appearance, was not calculated to induce a belief, that it would essentially impair his value. The plaintiff

however, being suspicious of it, required the warranty which was entered into. It also appeared afterwards, that the negro had been, for some time previous to the sale, under the hands of a doctor who pronounced it to be a *white swelling*, and that it would probably be incurable, and that it lessened his value from 25 to 30 *per cent*. It was proved, that he continued in the same situation up to the time of the trial.

The jury found a verdict of one cent for the plaintiff, and this was a motion for a new trial, on two grounds :

1st.—Because the Presiding Judge permitted improper evidence to be given to the jury.

2d.—Because the verdict was contrary to evidence.

Mr. Justice *Nott* delivered the opinion of the Court.

The view which the court has taken of the second ground made in this case, renders it unnecessary to decide the first, and the diversity of opinions prevailing in the court respecting it, renders it inexpedient, that I should express my own.

Both parties were aware of the unsoundness at the time of the contract, but both perhaps ignorant of the extent of the injury. Hence the cause and the necessity of the warranty to indemnify the purchaser against the possible and even probable result, that it might become (as it actually has) permanent and incurable. It was a matter of contract on the part of the defendant, and whether the plaintiff knew of the unsoundness or not, was immaterial; the defendant is bound to perform his contract. If it had been an implied warranty arising from the soundness of price, it would have been rebutted by the plaintiff's knowledge of the fact, or if it had been the object of sense alone, as the total loss of a leg or an eye, &c. it would not have been embraced in a general warranty; but being a case in which great skill and judgment were required to be exercised, it must be considered as coming within the warranty unless a special exception had been made, being a plain matter of contract, the terms of which were stipu-

lated by the parties themselves, the difference between the value of the negro, if sound, and his value in the situation which he was, became the rule by which the damages ought to have been estimated. The testimony on the point was clear and uncontradicted, and the jury were not authorized to disregard it and adopt an arbitrary rule of their own, unsupported by any testimony. The verdict was clearly against evidence, and a new trial must be granted.

Justices *Colcock*, *Richardson*, and *Huger*, concurred.

Nott & M'Cord, for the motion.

Starke, contra.

(a.)—J. F. WALLIS vs. ISAAC FRAZIER.

COLUMBIA, MAY TERM, 1821.

Tried before Mr. Justice *Gantt*, at Columbia.

This was an action to recover damages, by reason of the unsoundness of a negro, sold by the defendant to the plaintiff, for \$320, and warranted to be sound.

A new trial had been before ordered; and the evidence adduced, was very nearly the same as upon the former trial, need not be recited particularly again. The negro was proven to have been unsound from a permanent swelling, and the witnesses said, as before, that his value was less by reason of that swelling, than it would be if perfectly sound, by about twenty-five per cent. or thirty per cent. But it was also proven, that he was, notwithstanding the swelling, now worth \$450, and that the plaintiff had confessed that the defendant had offered to rescind the contract before the suit was brought.

The Jury again found a verdict for one cent damages; and the motion was for a new trial, upon several grounds. But the only one relied upon, was, that in as much as the Court set aside the same verdict before given, upon similar testimony, the Court will, for the reasons given for the new trial before, now order a third trial.

Mr. Justice *Richardson* delivered the opinion of the Court.

There can be no doubt, that the plaintiff is entitled to a verdict, but for how much, is uncertain. It seemed unreasonable, that the Jury, upon such testimony should give but one cent, and a new trial was ordered. But as two Juries, have, upon the same testimony, drawn the same conclusion upon a matter of fact; as they both have literally supported the law in finding for the plaintiff; and as we can lay down no rule for measuring the verdict with precision; as the plaintiff has in fact, not lost, but gained by the contract, substantial justice does not require that he should have a second new trial. He relies upon the

letter of his contract, not upon the actual loss he has suffered, and although he is entitled to a verdict; yet, to what amount is uncertain. For the opinion of the witnesses, was by no means imperative upon the Jury, though from the strength of their testimony, it was just to afford a second opportunity for greater consideration.

In such a case, I am disposed to say, with Lord *Mansfield*, in *Farewell vs. Chuffey*, (*Burr. 54.*) "a new trial ought to be granted to attain real justice; but not to gratify litigious passions upon every point of *summum jus*."

The Judge in that case, cites many instances of verdicts against both the strict rule of law, and the evidence, where the Court would not grant a second chance of success to a hard action. And though I would not charge the plaintiff with an unconscionable act in demanding his strict legal rights, yet his claim being undefined in amount, and in being proven, that he would not give up his original contract, and is a real gainer by it, I can perceive no sufficient reason for giving him a third chance, not merely to recover a verdict, but to augment his damages to an amount, which it does not appear he ever did actually sustain.

The motion is therefore dismissed.

Justices *Colcock*, *Gantt* and *Johnson*, concurred.

Nott & M'Cord, for the motion.

Stark, contra.



DANIEL M'CLARIN vs. WILSON NESBIT.

Nothing but gold or silver is a legal tender, under the constitution of the United States.

RULE on the sheriff of Spartanburgh district.

In this case an execution for \$ — had issued, with special directions to the sheriff to receive in satisfaction thereof, only *silver or gold*. He proceeded to make the money, and received from the defendant the full amount of the execution in cents the coin of the United States, which he tendered to the plaintiff, who refused to receive the same, on the ground, that they were not a legal tender.

The circuit court decided, that they were a legal tender, and discharged the rule.

A motion was now made to reverse that decision, on the following grounds, viz.

1st.—That nothing but gold or silver is a legal tender, under the constitution of the United States : And

2d.—That if congress have the power under the constitution to make any other coin a legal tender, they have not done so, and therefore cents are not a legal tender.

Before I proceed to the consideration of the first and principal ground, in this case, I will briefly observe on the second that if congress can create a legal tender, it must be by virtue of the "power to coin money," for nowhere in the constitution is the power to make a legal tender expressly given to them, nor is there any other power directly given, from which the power to make a legal tender, can be incidentally deduced. If however the power to coin money include the power to make a legal tender, the money coined, if not restrained by congress, must be a legal tender ; for, if this were not so, some further act than coining money would be necessary to making a legal tender ; and for that *further act* there is no authority in the constitution. I shall conclude then, that cents coined by the United States, are a legal tender, as they have not been restrained by act, if it shall appear, that the power to coin money includes the power to make a legal tender.

I shall now proceed to the consideration of the first ground, which is in substance a negation of the power to make a legal tender as incidental to the power of coining money.

The constitution of the United States is so elementary in its provisions ; it is so unlike those instruments for which the common law has provided rules of construction, that a court must always feel itself embarrassed whenever called upon to expound any part in the smallest degree doubtful. Subject it to the rules which govern penal statutes, and its active energy, if not its vital principle, must be destroyed. Apply to it the latitudinarian rules by which remedial statutes are construed, and it will be difficult if not impossible to avoid the exercise of legislative discretion. There are indeed a few rules furnished by

the constitution itself, and by contemporaneous expositions sanctioned by subsequent judicial decisions or long acquiescence that affords something like a limit to judicial discretion; but still there is left a field sufficiently extensive to awaken the apprehensions of those who are habitually governed by precedent. I have however the consolation to reflect, that the opinion I am now about to pronounce, is not only sanctioned by a majority of this court, but that there is a higher tribunal before which it may be reviewed, and by which it must be sanctioned before it can become the law of the land; a tribunal so well composed as to promise the most satisfactory decision, and of jurisdiction so enlarged as to insure universal attention. Should it err, it would be soon known to those with whom the ultimate power of correction is lodged, and who best know how and when to apply it.

At common law only *gold and silver* were a legal tender. (2 Inst. 577.) In England *copper* farthings and half pence were made a legal tender under the value of six pence by proclamation of Charles II, and by the 14 George III, c. 42, *Silver* coin was limited as a legal tender to sums under 25*l.* and *Gold* became the legal tender for all sums of and above 25*l.*

In this state (where the common law has been expressly adopted) anterior to all legislative and constitutional provisions on the subject, *Gold and Silver* were the only legal tenders. On the 6th February, 1752, the legislature passed the following act: "Whereas bills of credit or paper money issued either by the legislature during the former government under the king of Great Britain, or by the provincial congress, or by the legislature of this state, or by the continental congress, were made and established by law, to be a good and legal tender in payment of all debts and demands throughout this state; and whereas, at present, the said laws are found inconvenient, *Be it enacted*, that from and after the passing of this act, no bill or bills of credit, or paper currency whatever, are deemed and received as a legal tender." (P. Laws 306.) From the

passage of this act to the adoption of the constitution of the United States, the only legal tenders in this state were *gold and silver*, and those were so by virtue of the common law. Prior to the adoption of the constitution of the United States, the states respectively possessed and exercised jurisdiction over the "legal tender." In this state, anterior to the act of 1782, the legislature at different periods adopted different legal tenders; and it is to be observed, that so completely was this power regarded as in the states, that when congress wished their bills to be a legal tender, they were obliged to apply to the different states, to have them so made, which was done in this state by act. This power though much abused was never denied to be in the states, until the adoption of the constitution.

By the articles of confederation, agreed to in 1778, many years before the adoption of the constitution, the power of coining money and regulating the value, not only of their own coin, but the coin struck by the different states, (see 4th Sec. of the 9th Article) was expressly given to Congress, and yet, during the existence of the confederation, the states exercised jurisdiction over the legal tender.

It has been contended, that under the articles of confederation, Congress did possess, by virtue of the power to coin, the power of making a legal tender, although the states also possessed the power to make a legal tender. In other words, the states possessed the power of declaring what should be a legal tender; and yet Congress possessed the power of declaring that something else should be the legal tender. Would not the existence of such powers involve as great an inconsistency, as that Congress should have the power to establish a Bank, and the states of preventing or defeating its establishment? If Congress did not possess the power of creating a legal tender under the confederation, they do not possess the power under the constitution, for the grant in both instruments is the same; "to coin money." The states have

been limited in their exercise of power over the legal tender to gold and silver, but it does not follow, because power has been taken from the states, it has been given to Congress. The states are prohibited from passing *ex post facto* laws, impairing the obligation of contracts. Congress, however, does not therefore possess the power of doing so. Congress possesses no power that is not expressly given, or which is not necessary and proper to the carrying into execution of some power expressly given. The people then have thought proper, and I think wisely, to retain in their own hands, or at least to withhold from Congress and the state governments certain powers which appertain to sovereignty. They have said neither shall grant a title of nobility, nor pass any Bill of Attainder or *ex post facto* law, impairing the obligations of contracts; and if my construction of the constitution be not incorrect, they have further said, that nothing but gold and silver coin shall be a legal tender for the payment of debts. The language of the 10th Sec. of the 1st Article, is, "no state shall make any thing but gold and silver coin a legal tender in the payment of debts." The language of the 5th clause of the 8th Sec. of the 1st Article, is, "Congress shall have power to coin money and regulate the value thereof." Construe the two sections together, and the constitution appears to intend to limit the power of the states over the legal tender to gold and silver, and to give to Congress, the power of coining gold and silver. This construction is further supported by the two following considerations: 1st. One of the great objects which led to the adoption of the constitution was the annihilation of a spurious currency, which had for years afflicted the people of this country. Give to Congress the power of making a legal tender, and you but change the hand from which the affliction is to proceed; so construe the constitution as to restrict the legal tender to gold and silver, and one of the great objects for which it was ordained, is accomplished. 2d. The constitution, no where gives to Congress any control over contracts. It is indeed scrupulously avoided. If, however, they derive the power of making

a legal tender from the power of coining money, they indirectly obtain that which was intended to be withheld.

From every view I have been able to take of this subject, I am satisfied that it was not the intention of the framers of the constitution to give to Congress the power of making money; they have only been intrusted with the power of coining that which was money, gold and silver.

The decision of the Circuit Court, must, therefore be reversed.

Justices *Colcock* and *Richardson*, concurred.

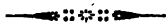
Mr. Justice *Johnson* dissented.

Mr. Justice *Nott*,

I concur in the conclusion of this opinion; but I am not prepared to say, that Congress may not make copper a tender.

Stark, for the motion.

Davis, contra.



JAMES RAINWATER, JUN. vs. ISAAC DURHAM.

An infant is only liable in his contracts for necessaries, and a horse will not be included in that denomination.—(a.)

Although an infant is liable for necessaries, yet only their value can be recovered.

MOTION for a new trial.

This was an action of assumpsit, on a promissory note, for ninety dollars, to which the general issue was pleaded.

It appeared, from the evidence, that the note was given for a horse; that at the time of the purchase, the defendant was a minor and had married and lived on a piece of land, where he supported himself by farming. The horse purchased was the only one owned by the defendant, and was not worth more than half the price given for it.

A verdict was had for the plaintiff, and a motion was made for a new trial, on the following grounds:

1st.—That a horse is not a necessary, and therefore the defendant, being an infant, is not liable for the purchase money.

2d.—That if a horse be a necessary, the infant is only liable for its value.

Mr. Justice *Huger* delivered the opinion of the Court.

On the first ground I have felt some difficulty. The English decisions have latterly very much enlarged the circle of necessities for an infant. In the case of *Hands & Slaney*, (8 T. R.) it was decided, that a livery for a servant was necessary to an infant, who was an officer in the army. A case is said to have been decided by Mr. *Baron Clarke*, and referred to in *Bull N. P.* 154, in which it was ruled, that sheep were necessary to an infant, who was a farmer. But with this case I am not satisfied, nor do the English courts appear to have been satisfied with it. In the case of *Whywall vs. Champion*, (*Strange* 1083,) it was ruled, that goods furnished an infant who was a shop keeper were not necessary. And in the case of *Dirth vs. Keighley*, it was decided, that the work done for a glazier and painter, who was an infant, although done to articles in the way of his trade, was not within the meaning of the term necessary. The object of the law is to guard the infant against his supposed indiscretion. To render him liable however for the contracts that may be supposed necessary to a farmer, a trader, or glazier, is to attribute to him a discretion which negatives the presumption of law. I am of opinion, that the horse was not, in this case, such a necessary as entitled the plaintiff to a recovery.

On the second ground, I will only observe, that could the rule have been so far stretched as to include a horse within necessities, the defendant would have been only liable for the value of the horse. The motion is therefore granted.

Justices *Colcock* and *Richardson* concurred.

Justices *Johnson* and *Gantt* dissented.

(a.)—*Freeman vs. Hurst*, 1 T. R. 40. *Reeve's Dom. Rel.* 227. 578. Query? Whether an infant can bind himself at all by a note for necessities? See *Williamson vs. Watts*, 1 Camp. N. P. 552. *Swasey vs. Admor. Vanderheyden*, 10 John. 33.

R.

JOHN SINGLETON vs. COMMISSIONERS OF THE ROADS.

The act of 1788 gives the Commissioners of the Roads no power to lay out roads for individuals.

And if the act of 1788 had given the Commissioners power to lay out roads for individuals, it would be limited to such roads as are *necessary*, and could not be extended to such as are only *convenient*.

The word *path* in old acts of assembly is synonymous with *road*.

THIS was an action of trespass, *quare clausum fregit*, brought in the circuit court, at Sumter.

In this case it appeared, that *John W. Rees* was the owner of a plantation from which there was a way long established, leading to the public road, between Camden and Charleston. A way however through the plantation of the plaintiff would have been shorter and more convenient to Mr. *Rees*. He accordingly applied to the Commissioners of the Roads, for such a way. They, without the consent of the plaintiff and without a tender of compensation, had the road opened, on which the plaintiff brought the present action.

A nonsuit was ordered by the Presiding Judge, on the ground, that the Commissioners of the Roads have the power to grant to one individual a road through the plantation of another. From this decision an appeal is now made on the following grounds, viz.

1st.—The act of 1788, under which the Commissioners pretended to act, gives them no power to lay out roads for individuals.

2d.—If such power be granted, it is limited to such roads as are necessary, and cannot be extended to such as are only convenient.

3d.—If this power be granted, it is void, being contrary to the constitution and *magna charta*.

Mr. Justice *Huger* delivered the opinion of the Court, I shall proceed to examine these different grounds, in the order they have been submitted.

The words of the act of 1788, are, "Commissioners are hereby authorized and required to lay out, make and keep

in repair all such high roads, private paths, bridges, &c. as have been or shall be established by law, or as they shall judge necessary in their several parishes and districts." The road in question is not a high road; and under the act, the only enquiry then is, what was intended by "*private path*?" *Path* is constantly used in our old acts as synonymous with *road*; as in the act of 1741 and '42, the way, leading to Palmer's ferry, is called a *road* or *path*. And until within a very few years, it was the custom of a large portion of the population of this state, to use the term *path* to the exclusion of *road*; the *public road* was called the *public path*, as *private roads* were called *private paths*. The term *path* being thus understood, the Commissioners are authorized and required to lay out, make, and repair such public and private roads as they may think necessary. Now a public road is a way through the state, or from town to town, and a private road is a way from public road to public road, or from the public road over a neck of land, towards its extremity, all of which are used by the public, and therefore the Commissioners, who are public agents, are required to make and keep them in repair. But ways which lead from public or private roads to the habitations of individuals are avenues not intended for public use, but for private purposes, and as such, not under the management of the public agents, the Commissioners, but are made and kept in repair by the individuals, to whose use they are exclusively appropriated.

But if the power of making and keeping in repair avenues or ways leading from public roads to the habitations of individuals, had been given by the act of '88, it is expressly limited to such as are necessary, and is not extended to such as are only convenient. The road in question may have been, and probably was, more convenient than the old road, but cannot be regarded as necessary, in as much as the old road not only afforded an outlet from the plantation of *Rees*, but was in fact the shortest to market, that is, to Charleston. But whether the road

be necessary or not, is a question of fact which ought to have been submitted to the jury; the nonsuit must therefore be set aside.

The third ground taken in the brief, I understand, was overruled by this court on a former occasion. (*a.*) I have been unable to find the decision referred to from the difficulty of searching the massy volumes of manuscript reports in which all the decisions of this court, prior to 1818, are buried, and from which they may never arise, unless aided by a regularly appointed reporter. I cannot however forbear the expression of the hope, that when minutely examined, the decision alluded to, will be found less at variance with the provisions of the constitution and of *magna charta*, than I at present apprehend. But on this point, it is now unnecessary to express an opinion.

The motion is granted.

Justices *Gantt* and *Nott*, concurred.

Justices *Colcock* and *Johnson*, dissented.

Blanding, for the motion.

Mayrant, contra.

(*a.*)—See the cases of *Withers vs. Commissioners*, 1 vol. MS. opinions Const. Court, Columbia, p. 102, & *State vs. Singleton*, Ditto 645. Also, *Ford vs. Whitaker*, 1 Nott & M'Cord 5. *Starke vs. M'Gowen*, Ditto 392. R.



JOHN THOMAS *et al.* vs. HARMON GEIGER & WILLIAM GEIGER.

The defendant, in an action of trespass to try title, cannot, after a recovery against him, in turn become plaintiff, and sustain a second action to try title.

MOTION to reverse judgment on demurrer.

This was an action to try the title to 350 acres of land in Lexington district.

The defendants pleaded the general issue, and a special plea in bar. The special plea stated, that the defendants were the purchasers of the land in question, from ———, who recovered it in an action of trespass, to try title, instituted by them against the present plaintiff, in the Court of Common Pleas, for Lexington district, and that on an appeal to the Constitutional Court, that recovery had been confirmed.

To this plea, there was a general demurrer, on which the present question arose.

The Presiding Judge overruled the demurrer, and gave judgment for the defendant in the action.

A motion was made to reverse that decision, on the ground, that the defendant in an action of trespass to try title, is not prevented by a recovery against him, from becoming himself in turn the plaintiff, and sustaining a second action to try the title.

Mr. Justice *Huger* delivered the opinion of the Court.

Prior to the act of 1791, (1 *Faust* 65. 2 *Brev. Dig.* 304,) the common method in this state of trying titles to land, was by an action of ejectment, regulated, however, by several statutory provisions. By the 4th section of the act of 1712, (*Public Laws* 101,) for settling the titles of the inhabitants of this province, &c. (*Trott's Laws*, 257,) the action of ejectment, "was restrained, from being brought more than once." By the act of 1744, (*P. L.* 191,) "for allowing the plaintiff a demandant in ejectment to bring more than one action, for the recovery of lands, &c., only a second verdict or judgment, nonsuit or discontinuance is conclusive on the plaintiff." Nothing is said of the defendant in ejectment. His situation was unchanged, and he could have brought his action of ejectment after recovery had against him in a second action. In this situation stood the parties, until the year 1791, when the legislature abolished the action of ejectment, and substituted therefor, the action of trespass. In the same act, it is declared, "that every act

of assembly relative to actions of ejectment shall be construed to relate to actions of trespass where the titles of land shall come in question. This act transfers none of the peculiarities of an action of ejectment to trespass to try title in land, but such as had been created by act. As the right of the defendant, therefore, to an action of ejectment after recovery had against him in a second action, did not grow out of the acts of assembly, it is not retained by the act of 1791.

It has been contended, that a change of action does not alter the rights of the parties, and therefore, in an action of trespass to try title, the parties retain the power of renewing the action as often as was permitted in the action of ejectment. The rights of the parties must not be confounded with the incidents peculiar to forms of action. The fictitious action of ejectment was substituted for a real action. As trespass to try title is now substituted for ejectment, were the rule contended for to prevail, trespass to try title as well as ejectment, must be governed by the incidents peculiar to a real action. This doctrine would leave no other difference between a real action, ejectment and trespass to try title, than a name. The legislature, however, contemplated a greater change. They were dissatisfied with the fictitious proceedings in ejectment and their consequences, and therefore submitted the action of trespass.

The motion is refused.

Justices *Chesek* and *Johnson* concurred.

Stark, for the motion.

Blundig, contra.

JAMES LYLES *et al.* vs. SUSANNA LYLES *et al.*

No particular form is required for a will; whether a paper is to be considered as a will or not, depends upon the intention of the maker, which is to appear either from the paper itself or from extrinsic testimony.

It is not indispensable, that a testator should originally have executed a paper as and for a will, provided he afterwards adopts it as such.

Where it is not evident from the intrinsic appearance of an instrument, that it is a will, and it is admitted, that the maker did not originally execute it as his will, and but little evidence, that he afterwards changed his mind, and the jury have decided, that it was not his will, the court will not grant a new trial.

THIS was an appeal from the Ordinary to the court of common pleas. Tried before Mr. Justice *Richardson*, at Fairfield, Spring Term, 1820.

The Ordinary refused to admit to probate the paper proposed, as the last will and testament of *Arromanus Lyles*, deceased, upon the ground, that as it purported to be a deed, it ought to have had all the forms of a perfect deed, or it could not operate as a will.

The paper was in the following words :

“ *State of South-Carolina,*

“ Whereas, I, *Arromanus Lyles*, senior, of Fairfield district and State aforesaid, do intend to intermarry with *Susanna Fennel or Kennerly*, of Lexington district and State aforesaid, having a desire, that my children, by a former marriage, should after my decease inherit my whole estate, both real and personal, clear of any incumbrance by my intended marriage with the above named *Susanna Fennel or Kennerly*, I hereby, barring her, the said *Susanna*, of any claim to any part of my estate, both real and personal, and I, the above named *Arromanus Lyles*, senior, do hereby renounce and bar myself and my heirs of any claim, right, or title, I may acquire to the estate of the said *Susanna*, be the same real or personal, by intermarrying with her, the same *Susanna*; reserving to myself and my intended wife, *Susanna*, during my life, a joint support out of the two estates, and at the death of either

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February, 1817.

(L. S.)

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that the paper
and *A. Lyles*,
and evidence.

signature to the paper was
that the appellants

should show, that the deceased intended, that the said paper should operate as his last will and testament.

3d.—Because the paper produced was the last will and testament of the deceased.

4th.—Because the judge erred in charging the jury, that if the testator intended, that the paper should operate as a deed at the time of its execution, it was incumbent upon the appellants to show, that he afterwards changed his intention and meant it to operate as a will.

The opinion of the Court was delivered by Mr. Justice *Richardson*.

The court charged the jury, that there is no particular form required for a will ; that whether the paper in question could be considered as the last will of *A. Lyles*, or not, depended upon his intention. (1 *Mod.* 117. 2 *Vesey, senr.* 441, 226. *Swin.* 74. 4 *Equity* 617. *Phillimore* 1, 9, 10, 11. *Cow.* 600. 7 *Bac.* 300, 299.) That the intention should appear either from the instrument itself, or from extrinsic testimony, and that it was not indispensable, that the testator should have originally executed it as and for a will, provided he had afterwards adopted it as his will. But as the intrinsic appearance of the instrument by no means proved it to be a will, and it being admitted, that the supposed testator *had not originally executed it as his will*, it would be dangerous to support it as his will, unless it plainly appeared, that he had subsequently adopted for a will the same instrument before intended for a different purpose. The jury were farther instructed, that they were to decide, whether the intention or *quo animo* necessary to the character of a will ever existed in the supposed testator, either at the time of execution or subsequently, and they should be governed by their own opinion of each species of testimony, intrinsic or extrinsic, notwithstanding any impressions of the court.

It may be observed, that no question being made upon the import or construction of any given clause ; but solely upon the general character of the instrument, which de-

pendent upon the intention. The judge left the conclusion to be drawn entirely to the jury, assisted by his opinion, plainly expressed upon the general character as *apparent upon the face of the instrument*.

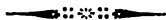
The jury having decided, that it did not constitute the will of *A. Lyles*, and the court being satisfied, that the verdict was supported by the testimony, the only question remaining, is, whether the judge erred in law? The position of the judge, that the character originally attached to the instrument, must remain, unless another had been given to it by the maker, is too plain for controversy. Then as *A. Lyles* did not intend the instrument in question, originally for his will, and as but very feeble evidence was adduced, if any, that he changed that intention, the conclusion, that the instrument constituted at no time his will, appears to me irresistible.

The motion is therefore dismissed.

Justices *Colcock*, *Nott*, *Gantt*, and *Johnson*, concurred.

W. F. De Saussure, for the motion.

Gregg, contra.



THOMAS WHITE *ads.* THOMAS REID.

Continued systematic trespasses by a person, in cutting down trees and carrying off timber, cannot give him a title to land by possession, under the statute of limitations,—(a.)

THIS was an action of trespass to try title.

The plaintiff produced a grant to *Joseph Tiller*, for the land, dated, 1st March, 1802, and a deed of conveyance from *Joseph Tiller*, to the plaintiff, dated 3d August, 1818. On the part of the defendant, a grant to himself was produced, dated 3d May, 1802. No question arose as to the genuineness of the title on either side, nor in the location. The defendant proved that *John M'Crory* went into possession, as his tenant, in 1817, and continued in the occupation of the land, until 1819, living in a house

on the land, and cultivating a small field. *Davis* proved that he built a house on the land, in 1816, and went into possession as defendant's tenant, and continued about a year. He said the land had been well timbered, but since the year 1802, the defendant had been cutting timber for his saw-mill, and the greater part of the timber had been cut down and used. The timber had proved very valuable to the defendant, and the land had been principally valuable on account of the timber, in as much as it was not well suited for cultivation. No person had cut timber but the defendant. *Joseph Kincaid* had been in possession under *White*, in 1802. Dr. *Charles Boyd*, (defendant's surveyor,) proved that almost all the timber was cut down, the land is very poor and stony, and but a small portion of the whole, fit for cultivation. The cutting appeared to have been at different periods and long continued. The land lies convenient to defendant's mill, which is not far from it. One witness said, it was more advantageous to use the timber for the mill, than to cut it down all at once for cultivation. *James Hamilton* proved much the same as Dr. *Boyd*. The verdict was for the plaintiff. The Judge charging in his favor, that the mere trespasses, however repeated and continued, could not constitute a title by possession.

The motion was for a new trial, on the following grounds :

1st. Because the defendant's title being a grant from the state to himself, supported by a short anterior possession in his father, and a subsequent occasional possession by his tenants, and the defendants exercising for a long time, acts of ownership, acquired a legal title in himself.

2d. Because the Presiding Judge misdirected the Jury in expressing the opinion, that such a title and such a possession could not overthrow the plaintiff's title, though his grant was never accompanied by a concurrent possession.

Mr. Justice *Richardson* delivered the opinion of the Court.

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... *sys-* ... trees ... possess- ... of land ... trespass. ... building ... from ... Oc- ... *anti* ... of the ... (347.)

... Law defi- ... it ... hunting ... poss- ... should be ... a possess- ... his posses- ... every other ... trespasser re- ... I mean, a ... was dis- ... the next tres- ... may have ... every-five, and ... trespasses ... mother's land. ... in ... A. to- ... continues ... the irra- ... might be ... which would

allow a Jury to require that *a tree* per day, would be sufficient ; or to decide, that one hundred are too little to constitute occupancy or possession.

The motion is unanimously dismissed.

Justices *Colcock* and *Johnson* concurred.

Gunning, for the motion.

Williams, contra.

(a.)—*Bailey et al. vs. Irby et al. ante*, 343.



WILLIAM YOUNG vs. COMMISSIONERS OF THE ROADS.

The Commissioners of the Roads are not liable to a private action for neglect of duty.

SPECIAL action on the case.

In this case the plaintiff brought his action against the Commissioners of the Roads for Edgefield district, for the injury done to his waggon and horses, from the insufficiency of a bridge over Wilson's creek, which it was alleged they were bound to keep in proper order and had not done so.

A verdict was given for the plaintiff; a motion was now submitted to set aside the verdict, on the ground, that Commissioners of the Roads are not liable, in a private action, for a neglect of duty.

Mr. Justice *Huger* delivered the opinion of the Court.

If a multiplicity of actions is to be avoided, this motion must succeed. It is difficult to imagine a more prolific source of litigation than would be found in the responsibility of the Commissioners of the Roads, in private actions, for every neglect of duty, to every individual who may be injured by such neglect.

In the case of *Russell vs. the men of Devon*, (2 T. R. 667,) it was ruled, that such an action would not lie against an overseer of the roads for an error of judgment

This was a special action of assumpsit, to recover damages upon the sale of eleven bales of cotton, said to be *fraudulently* and *falsely* packed by having the cotton in the centre of the bales wet. The cotton was sold by the defendant to the plaintiffs in Charleston, and by them shipped to their correspondent in Liverpool. It appeared by inspection in the usual way, both in Charleston and Liverpool, to be of superior quality, and in good order, and was sold in Liverpool at the then current price of good cotton. After the sale, the fraud was discovered, and the cotton returned. It was then sold at public auction as damaged cotton, at a considerable loss. This action was brought to recover the damage which the plaintiffs had sustained.

It was contended on the part of the defendant, that he was not liable at all under the circumstances of this case; and at all events, he was liable only for the price received in Charleston, with interest upon it, and not for the price for which it had been sold in Liverpool.

The Presiding Judge instructed the Jury, that the defendant was liable, and that they might give a verdict for the whole amount of damage, that the plaintiffs had sustained, which was the difference between the two sales in Liverpool, with interest.

The Jury found a verdict according to the directions of the Court, and this was a motion for a new trial, on the grounds relied on in the Court below.

Mr. Justice *Nott* delivered the opinion of the Court.

There are two questions submitted to the consideration of the Court in this case :

1st. Whether the plaintiff, in point of law, was entitled to a verdict? And

2d. If he was, whether the Jury have adopted a correct rule for the estimation of the damage?

The rule of law so often recognized in our courts, that selling for a sound price, raises an implied warranty of

soundness of property, is not denied ; but it is contended, that it does not apply to this case.

The counsel for the defendant, has contended : 1st. That when a person purchases an article, capable of inspection, as rice, flour, &c. and particularly where he has actually inspected it, he is considered as having purchased on his own judgment, and not on the credit of the seller, and therefore can have no recourse if it happens to be unsound or damaged. 2d. That where a staple commodity is sold for exportation, the purchaser must always be considered as having bought at his own risk, unless there has been some actual fraud in the transaction or an express warranty ; and in support of these positions, the case of *Vanderhorst & co. vs. David M. Taggart*, (2 Bay, 498,) is relied on.

The first question may be considered as decided in that case. The same principle has frequently been recognized in other cases, and I presume if it were now a new question, would be decided in the same way. I consider the doctrine of implied warranty, as having relation only to secret defects, which cannot by ordinary skill and diligence be discovered, though in the case of *Barnard vs. Yates*, (1 Nott & M'Cord, 142,) it seems to have been extended farther. If therefore this case came within the principle of the case of *Vanderhorst & co. vs. Taggart*, I should think it ought to be governed by it. But it is well known, that no method has been yet discovered by which packed cotton can be examined, except as to its exterior. It is never attempted nor expected of the purchaser, that he will do more. It is otherwise with rice. The barrels may be, and are usually unheaded, and the article examined throughout. Indeed I would consider the principle as applying to cotton as far as it is capable of inspection. Wherever, therefore, it appears to be of the same quality throughout, and there is no deception, I should not consider the purchaser entitled to recourse to the seller. But every sale of packed cotton must be considered in the nature of a sale by sample, which amounts to a warranty,

that the whole bulk shall correspond with the specimen exhibited.

2d. I do not consider the case of *Vanderhorst & co. vs. Taggart*, as having decided that the purchaser of a staple commodity, who purchases for exportation, stands on a different footing from other purchasers. The Judge who gave the opinion of the Court, went into a very correct train of reasoning, to show that there was no implied warranty in that case; and I concur with him to the whole extent that he has gone. The plaintiff in that case had examined the rice—he had taken it at his own inspection, and on his own judgment. It was uncertain whether it was damaged at the time of the sale, or had become so afterwards. The mischief would be intolerable, and litigation endless, if a seller in such case should be held liable. But in the case now under consideration, there was a positive, palpable fraud. The cotton was injured by pouring water into the centre of the bag, and then enveloping it with good cotton, in such a manner as to elude detection.

It is said, there was no proof that the defendant was cognizant of the fraud. But he was the grower of the article. If it was not personally done by him, it was by his servants or agents, for whose conduct he is answerable. Suppose stones or sand should be found inclosed in a bale of cotton, would a planter be excused by denying a knowledge of the fact, and laying it to the charge of his servants? Were such a principle to be established, the grossest fraud could never be detected. The character of the state is implicated in the abominable impositions that have been practised upon the purchasers of this article. It would be a reproach to the country, that they should go unpunished. I am not aware of any principle, upon which we can adopt a different rule for foreigners, who come into our market, from that by which our own citizens are governed. It would be literally acting upon the maxim of "*virtus post mortem*." But I cannot consent to stamp so great a stigma upon the front of our judiciary, as to promulgate such a doctrine from the bench. It is equally our duty and our

interest, to afford the most ample security to purchasers, against such frauds and imposition. I entertain no doubt, therefore, of the liability of the defendant. And I have as little doubt, that he would be equally liable in an English Court, upon the ground of fraud or misrepresentation, where implied warranties are not admitted to the extent that they are in our courts.

The next question is, what ought to be the rule by which the damages in such cases should be estimated?

Assumpsit is *nomen generalissimum* under which a great variety of special cases are embraced. It includes every case by simple contract, whether in the nature of a warranty, a promise to pay money, or an undertaking to do or perform any act from whence a promise either express or implied can arise. The damages to be recovered must always depend on the nature of the action and the circumstances of the case. The difference of opinion which seems to exist on the subject, I apprehend, has arisen from confounding the distinctions between the different forms of assumpsit. In an action for money had and received, the actual amount of money received (with interest in some cases) should be the measure of damages. In an action for goods or any specific chattel sold and delivered, the value of the thing sold; and so on in all other cases which furnish a standard by which the jury can be governed. But in cases of fraud, and other cases merely sounding in damages, the jury may give a verdict to the whole amount of the injury sustained or imaginary damages. An action for a breach of promise of marriage, is an action of assumpsit; yet the jury are as uncontrolled in the amount of damages which they may give, as in an action of slander or deceit, even though no actual damage be proved. In *Bacon* it is said, that in cases of contract, "If there are any circumstances of hardship, fraud or deceit, the jury may consider of them and proportion and mitigate the damages as they please. (2 *Bacon. tit. Dam.*) And Lord Mansfield says, "that fraud alone may be ground for an assumpsit, where there

is no express undertaking, as where a person sells property as sound, knowing it to be otherwise." (*Stewart vs. Wilkins*, Doug. 18.) In the case of *Williamson vs. Allison*, (2 East 446,) Lord Ellenborough says, "the form of the action (*i. e.* tort or assumpsit) cannot vary the proof." The case of *Nurse and Barnes*, (*Thomas Raymond* 77,) was an action of assumpsit. The plaintiff alleged, that the defendant, in consideration of ten pounds to him paid, promised to let him enjoy a certain mill. It appeared at the trial, that the mill would not let for more than twenty pounds a year, but as it appeared, that the plaintiff, by reason of his not having been permitted to enjoy the mill according to the contract, lost a stock which he had laid in, the jury assessed the damages to five hundred pounds. It was holden, that the damages were not excessive. *Per cur.* The jury in assessing damages in this case, were not confined to the sum paid, as a consideration for the enjoyment of the mill, or to the sum which the mill would let for, but had a right to take all the circumstances into consideration. In the case of *Peter Cusack vs. Des Coudres & Cravat*, (which was a breach of contract to make titles to a tract of land,) the jury gave three hundred dollars damages, although the plaintiff had paid only twenty dollars of the purchase money; and this court supported the verdict.

I apprehend, that after all these cases, it can no longer be considered, (as has been somewhat confidently asserted in this case) that (even) vindictive damages may not be given in an action of assumpsit; and surely it will not be denied, that plaintiff may recover the amount of the loss which he has actually sustained. Indeed I can see no other just rule than that which has been adopted in this case. It cannot be seriously contended, that the seller should merely refund the money which he had received, and leave the purchaser to pay the costs of transportation across the atlantic, and all the incidental expenses. The expenses of exportation and original purchase money ought not to be the rule, because a depression of price in the

foreign market might reduce the actual loss by reason of the fraud, below those expenses, and the seller ought not to be answerable for a loss, to which he had not contributed. Upon the principle of reciprocity as well as of good faith, the parties ought to be placed upon the same footing they would have been if there had been no deception; and that is the effect of this verdict.

The motion therefore must be refused.

Justices *Gantt*, *Johnson*, and *Huger*, concurred.

Justices *Richardson* and *Colcock* dissented.

Starke, for the motion.

R. P. M'Cord, contra.

(a.)—See *Misrcon & Timmons vs. Waldo & Freeman*, *ante*, 76. R.



BENJAMIN BLAKENEY *ads.* **JANE KIRKLEY**, by her next friend.

Where a person much indebted made a deed without consideration, to one of his children (out of several) of all his property, and declared to a witness, that he did it, to avoid paying a particular debt, *Held*, that the deed was fraudulent and void as to creditors, under the statute 13 Eliz.

Where a man owes a sum of money at the time of making a gift to his child, without consideration, and the money is never paid, the presumption of fraud can only be rebutted by showing very abundant property over and above the gift, kept and retained by the donor for the purpose of paying his debts: And if in the ordinary course of events, such property turns out to be inadequate to the discharge of his debts, the presumption of fraud remains, although the property reserved may have been deemed originally adequate to that purpose, if exclusively so applied.

THIS was an action of trover, for a negro girl named *Tomsel*. Tried before Mr. Justice *Richardson*.

The plaintiff claimed under a parol gift made by her father, in February 1811, which was proved by her two sisters, who were at the time twelve and fourteen years of

age, nor did it appear, that any other person was present at the gift.

The defendant claimed under a sheriff's sale, made November, 1812, by virtue of two executions of *A. M'Donald vs. John Kirkley*, the father of the plaintiff. The note, on which *M'Donald's* judgment was obtained, was given in 1810, and due 1st January, 1811, before the gift. The judgments were obtained in 1813, and no less than seven executions had issued and many efforts made to get the money. At the time the gift was made, the plaintiff's father had nine children, and was possessed of no other property than three negroes, (*all of whom he gave to the plaintiff,*) a small tract of land worth seven or eight hundred dollars, one witness said twelve hundred, and some horses, cattle, and hogs. Besides the debt to *M'Donald* there were executions in the sheriff's office against him for a considerable sum, and he was considered as the witness said, in embarrassed circumstances at the time this gift was supposed to have been made. It was proved, that within six months after the gift, he contracted a debt to one Rhodes, for \$305, on which a judgment had been obtained, and frequent executions issued; but the money could not be raised. One witness swore that *Kirkley* told him several years ago, that he had given his negroes to the plaintiff, to avoid the payment of the debt to *Rhodes*.

The Jury found for the plaintiff in the following words :
“ We find for the plaintiff, the negro girl, *Tomsel*, and forty dollars for her hire, or five hundred dollars.

The defendant moved for a new trial on the following grounds :

1st & 2d. That the gift was made with intent to defraud creditors, and therefore void, by virtue of the statute 13 Eliz. and by the Common Law.

Mr. Justice *Richardson* delivered the opinion of the Court.

The amount of debts due by the donor *John Kirkley*, at the time of the gift, was proven to be between five and six hundred dollars, to wit:

To A. M'Donald, two notes, 2d Jan. 1811,	300
Henry Jackson, draft,	52
William Danzy, receipt,	66
Do. do. do.	58
Isaac Smith,	70
Immediately after the gift, he contracted, in 1811, the following debts, to wit:	
Wm. Rhodes 5th Sept.	305
M'Cants, Nov.	60
Harrison, May,	55

\$460

Ever since the period of the gift, he (the donor) has been embarrassed by old and by new debts. The gift was secretly made; (none but his two daughters being present) it was of *all his slaves*, and to *one child* out of *nine*. These facts and his situation at the time, were, in my judgment, enough to prove the fraud according to the cases adjudged under the statute 13 Eliz. But *David Buchan*, adds, that *J. Kirkley* once declared to him, that he made the gift to "keep from paying the debt to *Rhodes*." I consider that the many decisions under the statute of Elizabeth, clearly establish the position, that where a man owes a sum of money at the time of making a gift to his child, without consideration, and the money is never paid, the presumption of fraud can be rebutted only by showing very abundant property over and above the gift, kept and retained by the donor for the purpose of paying his debts; and if in the ordinary course of events, such property turns out to be inadequate to the discharge of his debts, the presumption of fraud remains, although the property reserved may have been deemed originally adequate to that purpose, if exclusively so applied. In a word, the case must be an exceedingly fair one, not to be deemed fraudulent where a debt due prior to the gift shall have remained un-

paid. Upon this point, the law is very strict against debtors who assign property gratuitously.

In the case before us, the badges of fraud were evident, the property remained with the donor, the gift was considerable, and was not made public, and the donor has never been able to pay his old or his new debts. And the chattels retained, consisted of a few cattle, hogs and horses, which are in their nature very unstable, and not easily traced, and the land was of very uncertain value. (*Rob. Fraud. Con.* 449, 451-2, 520-3, *Reaborne vs. Teasdale.* 2 Bay, 550, *Jacks vs. Tunno.* 3 Eq. Rep. 1, *Rowland vs. Sullivan.* 4 Do. 518.

The gift appears to me, therefore, evidently fraudulent, and the motion is granted.

Justices Colcock, Nott, Johnson, and Huger, concurred.

Mr. Justice Gantt :

I dissent in this case, because, from the evidence which the report of the case afforded, it appeared that one witness proved, that the tract of land which the donor owned at the time of the gift, was worth twelve hundred dollars. His debts at the time of the donation, were about five or six hundred dollars. The gift was made to a daughter, who by nature possessed a feeble constitution. Now although the land was afterwards sold for a much less sum, under an execution, to wit, for \$360, still I can see nothing in the transfer of this property, to an unfortunate child, as affording evidence of fraud. The donor had other property besides this tract of land, and I feel a thorough conviction, not only of the propriety, but legality of the donation.

DONLEVY & Co. vs. COOPER & Co.

Where a defendant (who is likewise an attorney) neglects to enter an appearance at the first court, for the purpose of taking advantage of a supposed inaccuracy in the writ at the second court, and an order for judgment is obtained, it will not afterwards be vacated for the purpose of permitting him to put in a plea.

Accepting the service of a writ will not be considered as an appearance; it does nothing more than dispense with the service of the sheriff.

IN this case, one of the defendants, who was also an attorney of this court, accepted the service of the writ. He omitted to enter an appearance at the first court, after the return of the writ according to the requisitions of the act of assembly and the practice of the court. He acknowledged, that his reasons, for not entering an appearance, were, that he might not thereby cure a supposed irregularity in the copy writ, of which he intended to take advantage at the second court. The plaintiff's attorneys had taken an order for judgment for want of an appearance and placed the cause on the writ of enquiry docket.

At the second court, the defendant, after an unsuccessful attempt to quash the writ for irregularity, moved to set aside the order for judgment, and to plead to the merits of the action.

The Presiding Judge was of opinion, that as he had not entered an appearance at the first court, he was not entitled to plead; but as the plaintiff's attorneys were not then prepared to execute a writ of enquiry, and it was stated, that the practice had been various in that respect, he permitted the plea to be put in with leave to bring the case up, to take the opinion of this court upon it.

The following questions were now submitted to the consideration of the court:

1st.—Whether a defendant who has not entered an appearance at the first court after the return of the writ, is in any and in what cases entitled to vacate an order for judgment upon pleading issuably?

2d.—Whether accepting the service of the writ was such an appearance as entitled him to plead?

Mr. Justice *Nott* delivered the opinion of the Court.

The act of assembly regulating the proceedings of the courts, is in the following words: "The plaintiff shall, on the return of such writs, proceed to file his declaration during the sitting of the court next after the writ is returnable, or at any time after, until the next succeeding court, and shall take judgment by default against the defendant in said writ, unless an appearance has been regularly entered by defendant's attorney, with the clerk of the court during the sitting of said court, and the defendant, if he puts in an appearance as aforesaid, shall and may put in his plea in writing, with the clerk of the said court, within one month after the declaration is filed or judgment may be taken by default."

The only case then in which the defendant is entitled to plead is where he has entered an appearance with the clerk during the sitting of the court. The courts have by a liberal construction of the act, permitted persons to come in who are absent from home at the time that the copies of writs had been left at their houses, and did not return until after court; so where an attorney is employed and has omitted to enter an appearance, the court will not suffer the party to be injured by his neglect. And in other cases where the omission has arisen from causes not within the control of the party, and without any neglect on his part, such indulgence has been extended to him. But in this case, no such excuse is pretended; on the contrary, it is acknowledged to be an artifice resorted to expressly for the purposes of delay. It is the last possible case therefore, in which the defendant is entitled to any favor from the discretion of the court. Besides, it is not even now pretended, that the defendant has any just defence, and the court in such a question will look to the merits of the case.

2d.—The acceptance of the service of the writ does nothing more than dispense with the service by the sheriff. It cannot be an appearance pursuant to the terms of the act. But I am induced to think, that according to the liberal practice of our courts, it ought so to be considered by the gentlemen of the bar, when an attorney has accepted the service of a writ for his client, and has omitted to enter an appearance. I would think according to the rule above laid down, that the client ought not to suffer by his neglect. But in this case the attorney was the party and did not intend it as an appearance, but purposely omitted to enter an appearance. He was not therefore entitled to be let in at the second court. The order must be rescinded and the cause placed again on the docket of writs of enquiry.

Justices *Richardson, Huger, Colcock, and Johnson*, concurred.

Nott & M'Cord, for the motion.

Clifton, contra.



WADDLE vs. COMMISSIONERS OF THE PICKENSVILLE LOTTERY.

The Commissioners of a Lottery are bound by the terms of the scheme which they have exhibited; and where they permit the time to elapse, in which the lottery was to be drawn by the scheme, without any drawing, a purchaser of tickets will be entitled to an action to recover back his money.

THIS was a Summary Process, to recover from the defendants the price which the plaintiff had paid for certain Lottery Tickets.

It appeared that the defendants had published in a paper, entitled the "Pendleton Messenger," under date of May 14, 1817, the scheme of a lottery, wherein the following statement was made: "The drawing will commence as soon as a sufficient number of tickets can be sold,

and after its commencement, will draw two days in each week, 500 tickets per day."

On the 15th of January following, the commissioners caused to be published in the same paper, the following notification: "At a meeting of the commissioners of the lottery, for the relief of persons who suffered by the late fire at Pickensville, South-Carolina, *Resolved*, That the drawing shall commence on the first Tuesday in July next, and the days of drawing shall be Tuesdays and Fridays in each week."

The commissioners having suspended the drawing for more than a year from the last mentioned period, this action was instituted by the plaintiff to recover the amount paid by him for tickets, on the ground, that the lottery, and of consequence the consideration upon which the money was paid, had failed, the time having expired, within which the lottery would have been completed, had the terms held out to the public been fulfilled.

The case was tried at Pendleton, in the Spring Term of 1820.

The Presiding Judge, Mr. Justice *Johnson*, with a view to the question being brought up at the Constitutional Court, decreed for the defendants.

This was, therefore a motion to reverse that decree, on the ground, that the defendants were, by law, liable to refund this money to the plaintiff.

Mr. Justice *Gantt* delivered the opinion of the Court.

In all undertakings of this kind, those who may become adventurers, are influenced in their determinations, by the terms or scheme as published. One of the contracting parties has no right to the terms without the approbation of the other; those terms may be said to constitute the law of the case, and if not strictly fulfilled, the consideration has failed, upon which the money was paid. This conclusion, I take to be very clear, upon general principles.

On the part of the defendants, it has been urged, that

they entertain a hope of being yet able to prosecute this lottery ; but it is contended, that by the 4th section of an act of the legislature, passed in 1810, they are allowed five years to draw and complete the lottery, and that no action can be maintained against them for monies paid for tickets till the expiration of that period. The clause alluded to is in these words : "*And be it further enacted, That all Lotteries which have been granted during the present session of the legislature, or which may hereafter be granted, shall be, and they are hereby declared to be forfeited, unless the same shall have been drawn and completed, within the term of five years from the date of the grant.*" The object of this act was to forbid and put down all private unauthorized lotteries, imposing a penalty against those who should transgress therein, and constituting it an indictable offence. The clause is quoted in relation to granted lotteries, and can have no possible bearing upon this question. Under its sanction, it may be said, that the commissioners might have submitted a scheme which would have put it out of the power of those who purchased tickets, to compel a return of the money intended to be risked, until the expiration of the five years from the grant, but such was not the scheme adopted by them. The object of the clause was not to authorize the commissioners appointed to conduct a lottery, to violate the terms of a scheme which they might propose, and under which persons might have been induced to purchase, but to compel the adoption of some scheme or plan by which the lottery should be completed within the prescribed time, and on failure, that it should be forfeited. In this case, it is apparent that the contract between the plaintiff and the commissioners has been violated on their part. The plaintiff has paid money on a consideration which has failed, and the defendants ought *ex æquo et bono* to refund.

I am of opinion that the decree should be set aside, and that a new trial should be granted.

Justices *Colcock*, *Richardson* and *Huger*, concurred.

Mr. Justice *Johnson* dissented.

M' Duffie, for the motion.

W. R. Davis, contra.



THE STATE *vs.* DAVID BARRONTINE.

The Statute 33 Edw. I. with regard to challenges of jurors, is of force in this state; and the Solicitor can only challenge for cause.

THIS was an indictment for horse stealing, tried at Columbia, October Term, 1820. When the prisoner was put to the bar, and the jury called to pass on his trial, the Solicitor challenged the first juror without assigning any cause. His right to challenge, without assigning the cause forthwith, was questioned, and the Presiding Judge determined, that the challenge on the part of the state without cause assigned at the time of challenge, was inadmissible.

The Solicitor then moved to postpone the trial for the purpose of appealing from this decision.

This being ordered, a motion was made to reverse that decision.

1st.—Because, by the common law, the state had a right to challenge.

2d.—Because this right cannot be taken away by the 33 of Edw. I. the same not being of force in this state.

3d.—Because, if the statute of Edw. I. is of force here, yet the right of challenge is not taken away from the state.

Mr. Justice *Colcock* delivered the opinion of the Court.

It is clear, that before the passage of the statute of the 33 of Edw. I. the king exercised the right to challenge peremptorily as many of the jurors as were supposed not indifferent for him. (1 *Chitt. Crim. Law* 534.)

But this power being liable to great abuse, it was by that statute ordained, "that notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the said challenge shall be enquired of according to the custom of the court; and let it be proceeded to the taking of the same inquisitions as it shall be found, if the challenges be true or not, after the *discretion* of the justices." This statute is not made of force by the act of 1712. But by the 18th sec. of the jury law, (*P. L.* 124. 1 *Brev.* 448,) passed in the year 1731, it is enacted, "that all challenges and exceptions to jurors shall be allowed and admitted as are allowed and admitted by the laws of Great Britain, except the challenge to the array in respect of partiality, affinity, or consanguinity, of the provost marshal." By which it appears, that we are to be governed by the law of England, as it stood, after the passage of the statute of Edw. as the common law right of the crown, to challenge peremptorily might operate to prevent or delay the trial of an offender, it was the object of the statute of Edw. to remedy this evil, but clearly not to take away from the crown the right of challenge altogether. It has therefore been so construed as to secure this right to the accused, and at the same time to reserve to the crown the right of challenge for cause, at the *discretion* of the judges. In *Chitty's 1 vol. Crim. Law*, it is said, "that it is agreed, that under this statute, the crown is not compelled to show any cause of challenge, until the panel is gone through, so that it may appear, that there will not be sufficient to try the prisoner, if the peremptory objection is admitted to prevail; and it has also been holden, that if the defendant, in order to oblige the king to show cause, challenge the *touts paravaile*, he must first show all his causes of objec-

tion, before the king can be called upon to show the grounds of his challenges." The same doctrine is laid down in 2 *Hale P. C.* 271; *Hawk.* 62, c. 43, s. 3; 4 *Black. Com.* 353; 4 *Burns tit. Furors*; and by a reference to the authorities relied on by these writers, it will appear to have been the settled doctrine for near three hundred years. In 1 *Ventris* 309, it was so decided, one judge (Wylde) dissenting; in another case, (*Sir Thomas Reynolds' Rep.* 474,) it was resolved by the whole court, that the king need not show his cause of challenge, until the panel were gone through, both of which were in the reign of Charles II. The case quoted and relied on by the defendant's counsel, from *Moore's Rep.* 595, was anterior to these cases being determined in the reign of Eliz. and in no wise infringes the general doctrine, for the question there, was, whether the king was bound to show cause of challenge at all, and three of the judges of the king's bench held, that he was not. They were decidedly wrong, and upon the case being sent to the common pleas, they all agreed, that cause must be shown, but do not say when. The solicitor then had a right to challenge, and was not bound to show cause, until the panel was exhausted.

The motion is granted.

Justices *Richardson*, *Johnson*, and *Huger*, concurred.

Mr. Justice *Gantt* dissented.

Starke, Solicitor, for the motion.

Sanford, contra.



SAMUEL CALDWELL vs. ALEXANDER M'KAIN.

Where a defendant gave his note to the plaintiff, on condition, that the plaintiff would give him a note which he held on a third person, the plaintiff cannot recover on the note given by the defendant, unless he deliver the note on the third person to the defendant, agreeably to their agreement.

In a written agreement to pay money on account of a third person, the words, "for value received," are a sufficient expression of consideration to charge the party under the statute of frauds.—(a.)

THIS was a summary process, tried at Fairfield, Fall Term, 1820, brought on a note made by the defendant to the plaintiff, in the following words: "On or before the 11th of November, 1818, I promise to pay Samuel Caldwell or bearer, on account of M. Miller, the just and lawful sum of forty dollars, *for value received*."

"(Signed)

ALEX. M'KAIN."

The case, made by the defence, was this, *Miller*, the third person, mentioned in the note, had purchased property, to the amount of the note, at a vendue made by the plaintiff, the terms of which were, that the purchasers were to give note and security. *Miller* had given his individual note to the plaintiff, and some time after in the presence of the plaintiff, solicited the defendant to become his security, which he promptly refused to do, saying he would not be any man's security, but observed to the plaintiff, that if he would give him *Miller's* note, he would give him his own note, for the amount, which was agreed to, and the plaintiff promised, (not having *Miller's* then with him) that he would send it to him, in two or three days; and the witnesses stated emphatically, that the present defendant gave the note in question, on the express condition, that the plaintiff should afterwards give him *Miller's* note in exchange, and it was further proved, that the plaintiff never had sent *Miller's* to the defendant, but stated, it was lost, of which fact however, there was no legal proof.

For the defendant, it was contended, that the plaintiff was not entitled to recover,

1st.—Because this was an undertaking to pay the debt of another and was not obligatory without the consideration on which it was founded, was set forth.

2d.—Because the consideration had failed, in as much

as the plaintiff had not delivered *Miller's* note to the defendant, as was stipulated between them.

The Presiding Judge decreed for the defendant, and a motion was made for a new trial. The grounds of the motion, taken together, deny the legal correctness of these positions.

Mr. Justice *Johnson* delivered the opinion of the Court.

This case was tried before myself, and the impression on my mind was, that the question made by the first ground of defence, had been decided by this court in the case of *Stephens, Ramsay, & Co. vs. Winn*; but it is found, upon examination of the manuscript report of that case, that although like the present in every other respect, the note wanted the words, "*for value received*," used in this note. In that case the court decided, that under the statute of 29 Charles II. c. 3, usually called the statute of frauds, a writing to charge one man for the debt, &c. of another, should express the consideration; but I am satisfied, that this case is distinguishable from that, and that the words, "*for value received*," is a sufficient expression of a consideration, to charge the party. It is an admission of the party, that a valuable consideration has been received although the thing itself is not mentioned.

On the other ground of defence however, I think the decree is maintainable. The witness stated in the strongest terms, that the defendant made it an express condition, that the plaintiff should deliver him *Miller's* note, and he promised to do so within two or three days, which he has not yet performed, although more than two years have elapsed. The first impression made by the evidence on my mind was, that the sole object of the delivery of *Miller's* note to the defendant, was, that it might be cancelled, and that the evidence of that debt might be destroyed, which occurred to me, was as effectually done by the note, which the defendant gave to the plaintiff, as if it had been delivered; and that the object of a delivery was fully accomplished. But to come at this conclusion, it

was necessary to put a forced construction on the evidence, and upon further consideration, I was satisfied, that other objects which the defendant might have had in view at the time, consistent with the evidence, might have made the possession of the note an important consideration. In his hands it would have furnished evidence of the debt due by *Miller*, on which an action might have been brought when it became due, and this view was strongly supported by the fact which appeared on the trial, that *Miller* had afterwards become insolvent, so that the debt was lost to the defendant.

The court concurs in this opinion, and the motion is therefore refused.

Justices *Colcock*, *Nott*, *Gantt*, and *Richardson*, concurred.

M^r Call, for the motion.

Pearson, contra.

(a.)—See *Aiken vs. Duren*, *ante*, 370, and *Stephens, Ramsay, & Co. vs. Winn*, *in note*. R.



AUGUSTUS FITCH, *ads.* THE STATE.

Where a bill is given out for a libel against a person, and the Grand Jury returns, "no bill," he is not entitled, as a matter of course, to a discharge from his recognizance, but the Solicitor may prefer a new bill against him without assigning any cause.

THIS was a motion to discharge the defendant from his recognizance to appear at October sessions, 1820, for Richland district, on a charge of libel, wherein the Grand Jury had returned, "no bill."

On reference as usual, to the Solicitor, he suggested to the Court, his intention of preferring a new bill.

The counsel for the defendant, contended, that it was incumbent on the Solicitor to show to the Court some satisfactory reason for pursuing this course, and in default, that the defendant was entitled to a discharge.

Mr. Justice *Gantt*, who presided, overruled the motion.

The defendant appealed, on the ground, that the Solicitor has no power to prefer a new bill, without showing to the Court some satisfactory reason for so doing.

Mr. Justice *Gantt* delivered the opinion of the Court.

As a legal principle, there can be no doubt but that a prosecutor may prefer a new bill where a Grand Jury has returned, "no bill," 4 *Black.* 305, is in point, and I have known no time when this practice in our Courts has not prevailed. *Blackstone*, says, that where the bill is returned, "not found," the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent Grand Jury. There is no inconsistency in those sentences. He may be discharged without further answer; but from what? The meaning is evident, from the bill which has been thus returned, not from the charge for which he was recognized to appear; on this, if essential to public justice, a fresh bill may be given out. The proofs may have been defective on the first bill, and this deficiency may be supplied on the preferment of another. It is the verdict of a petty Jury alone, which can operate as a discharge of the defendant from the accusation against him. If on trial, they find the party not guilty, he is then, says *Blackstone*, for ever quit and discharged of the accusation. The implication is clear, that before then he is not so discharged. It is not to be supposed that the Solicitor in the exercise of a discretion with which he is invested, would use it in an arbitrary or oppressive manner, nor would it be consistent with justice, that an offender should be permitted to withdraw himself from an accusation where in the opinion of the solicitor, his guilt might be made to appear more fully before another Grand Jury. This being the case, ought the solicitor to be constrained at the requisition of the defendant, to exhibit the evidence upon which he expects a future bill to be supported. I think not. By the condition of the recognizance entered into by the defendant, he is not only to appear to answer the specific charge exhibited against him,

but is to do and receive what shall be enjoined by the Court, and not to depart without license, and in the mean time, to keep the peace of the state, and be of good behaviour towards all the citizens thereof, and especially towards the prosecutor. The terms of this recognizance are such as to leave it discretionary with the Court to refuse the defendant's discharge, though no cause be shown by the Solicitor why he intends to prefer a new bill. In *Comyns's Digest*, 692, it is said, "if one be taken up for a libel, and enters into recognizance to appear the first day of the term, *ad respond.* and not to depart, and the Attorney General then exhibits an information, and then enters a *nolle prosequi* on it, and on the last day of the term, files another information for the same libel, and another, and on this last information, defendant is convicted, if he does not appear his recognizance is forfeited." In the instance given, the conviction may have been occasioned by the evidence given on the other libel, but yet as the former was conjoined therewith in the information, the recognizance was deemed sufficient to compel the defendants appearance.

I am of opinion, that the motion in this case should be overruled, and this is the unanimous opinion of the Court.

Justices *Johnson*, *Richardson* and *Huger*, concurred.

Sanford, for the motion.

Starke, Solicitor, contra.



THE STATE vs. JOHN RUSHING.

Where a man is indicted under the gaming act, for playing cards with three certain men, the indictment will not be supported by proving that he played with a man not mentioned in the indictment.

THIS was a prosecution by indictment, under the act of assembly, of 1813, usually called the gaming act; tried at

Chesterfield, November Term, 1820, before Mr. Justice *Richardson*.

The defendant, with three others, *Isaac Johnson*, *William Wells* and *John Copeland*, were charged in the same indictment with playing at a certain game, with cards, and did bet money, &c. generally, and without alleging that they played severally.

The evidence, as to this defendant, was, that he played at cards with one *Neil M'Neil*, and not with either of the other persons mentioned in the indictment.

On the trial below, it was objected that this evidence did not support the charge made in the indictment, but the Presiding Judge thought otherwise, and so directed the Jury; and a motion was made for a new trial on the ground of supposed misdirection of the Court on this point.

Mr. Justice *Johnson* delivered the opinion of the Court.

In criminal proceedings especially, the utmost strictness is necessary, that the party accused may be fully apprised of the specific charge for which he is called to answer. Hence it is necessary in every indictment for a particular offence, to state with accuracy the manner of its commission; at least that part of the charge should substantially correspond with the evidence adduced to support it. 2 *Hale*, P. C. 184. Thus, if an indictment for murder, charges, that the death ensued from a blow given by a weapon, and it be proven that the death ensued from poisoning or strangling, it will not maintain the indictment, for the manner of the death is not the same. (2 *Hale*, 185.) On the same principle, if several are jointly charged with an offence, in which the concurrence of several are necessary to its perpetration, as in the case of a riot, proof of the commission by one of the defendants with other persons than those named in the indictment, would not support it, for the reason before given, that the manner of the offence should be certainly laid.

It is not intended to evade the position of the Solicitor, opposed to this motion, that several persons may be indicted for the same offence, and some may be convicted and some acquitted, the correctness of which is admitted ; but the application of it to this case is denied. That rule applies to all cases where several are indicted for the same offence, and the practice in this state, so far as I am conversant with it, is not to include several defendants in the same indictment for distinct offences, although of the same character, unless they are dependant one upon another as principal and accessaries ; but I find, upon examination of the English authorities, they are admissible, with this restriction, that the offence must be laid severally ; as in the case where several were indicted for erecting several inns, *ad commune nocumentum*, but in the language of the authority, it must be laid *separatim erexerunt* and for the want of the word, "*separatim*," the indictment was quashed. (2 Hale P. C. 174.)

Let us apply these rules to the present case. The defendant was indicted with the three other persons, for an offence which one person alone was incapable of committing, for an individual cannot play at cards alone, and the indictment does not charge the offence to have been done severally, and as more than one was necessary to the commission of the offence, the inference is, that it was jointly done ; the defendant could not therefore be prepared to meet a charge for playing with other persons ; or in other words the offence proved is not that contained in the indictment. The motion must therefore be granted.

Justices Colcock, Huger, and Richardson, concurred.

May, for the motion.

Evans, solicitor, contra.

EXECUTORS OF J. EVANS vs. JOHN ROGERS.

A new trial will not be granted on the ground of new evidence being discovered after the trial.

Where a person purchases property at Sheriff's Sale, at which the owner was present, it will not be presumed that he purchased as the agent of the owner, without strong testimony.

A sheriff's Sale of personal property need not be evidenced by a return on the *Fi. Fa.* or a bill of sale from the Sheriff, but may be established by parol testimony.

THIS was an action of Trover, brought by the Executors of *John Evans*, against the defendant, *Rogers*, for a negro woman named *Rose*.

It appeared in evidence by the testimony of Mr. *Brister*, that this woman, in virtue of a *Fi. Fa.* in the life time of the testator, had been levied on and sold as his property. That the defendant *Rogers*, had bid her off at \$301. That possession of the woman was delivered to *Rogers*, but no bill of sale was given by the witness as sheriff. He was told by the purchaser, to make an entry, and the following entry was made in his book, by the direction of the defendant: "*John Rogers*, has paid this debt, and takes the execution, levied as it is on the negro." There was no return on the *Fi. Fa.* of the sale made by the sheriff, and the only evidence in relation to it, was the memorandum in the Sheriff's book, and by parol. The execution under which the sale was made, was produced, and the sheriff, *Brister*, further testified, that the woman was sold under the execution, at public outcry, *Evans*, the testator, and *Rogers*, being both present. A ground taken in the trial of this case by the plaintiff, was, that *Rogers* had purchased this woman as the agent of their testator. It appeared in evidence, that after the sale, the woman returned to the plantation of the testator, and remained there for some time before she was taken by the defendant. A Mr. *Covington*, proved a conversation between the testator and defendant. The latter spoke of taking the woman home, and the testator replied, that he must use his pleasure.

The testator informed this witness previous to *Rogers's* taking the woman home, that he (the testator) had her on hire, at \$5 per month. That after the defendant had taken the woman home, the witness met with the testator, who informed him of the circumstance, and said that *Rogers* had treated him ill. During the time that the testator had possession of the woman, after the sale, in a conversation with the testator, the witness said he asked him if *Rose* belonged to *Rogers*, he replied yes, that he had hired her at \$5 per month, and that when he paid *Rogers*, *Rose* was to become his again.

Aaron Pearson deposed, that he was present, when a demand was made by the plaintiffs for the negro, that defendant refused to deliver her. The defendant told *Evans*, the executor (who made the demand) that if he would pay him his money, he would give up the negro, upon which *Evans* pulled out his pocket book, and said to defendant, that he was ready to pay him if he would come to a settlement. *Rogers* refused to receive paper money, which the book contained, saying, he would take nothing but hard money.

Mr. Bethea deposed, that he was present at the sale, and thought that the defendant was buying for the testator, who was at the time his overseer, but did not hear the defendant say that he purchased her for testator.

Joshua David proved, that he always understood from defendant, that he did not mean to take advantage of the sale, provided there were some conditions complied with, of which the witness knew nothing.

Mr. Furness deposed, that *Rose* was worth seven or eight hundred dollars. That the testator and five of his hands had worked in the crop of *Rogers*, and that one or more of the cotton crops made, had gone into the hands of the defendant.

The defendant offered no testimony.

The case was tried before *Mr. Justice Gantt*, Fall Term, 1819, for Marlborough district, and a verdict was found for the defendant.

The grounds of appeal were : 1st. For misdirection of the Presiding Judge, in charging the Jury, that a sheriff's sale of a negro, need not be evidenced by the sheriff's return on the execution, or a bill of sale, but might be proved by parol.

2d. That there was sufficient evidence, that the defendant purchased the negro as the agent of the plaintiff's testator.

3d. That since the trial, abundant evidence has been discovered, of the declarations of the defendant, made at the sale, that he was bidding for the plaintiff's testator.

Mr. Justice *Gantt* delivered the opinion of the Court.

The last ground taken by the counsel for the plaintiffs, has not been insisted on in the argument, as being maintainable. It has often been decided, that the discovery of new evidence after trial was not a good ground for a new trial. This ground, therefore, needs no further notice, than a reference to 2 *Bay's Rep.* (268,) to show that it cannot avail. (*State vs. Harding.*)

From an attentive examination of the evidence, it appears not to warrant the conclusion drawn from it by the plaintiffs, and which forms the second ground taken in the brief for a new trial : That the defendant purchased the negro *Rose*, as the agent of the plaintiff's testator.—Belief prevailed on the day of sale, that such was the fact, but it was unauthorized from any declaration on the part of the defendant. Besides, it conflicts with what actually took place, a levy duly made, a sale at public outcry, when the testator and defendant were both present, and when the defendant became the purchaser of the woman sold. It conflicts with the positive declarations of the testator, after the sale, that the right of property in *Rose* was in the defendant, from whom he had hired her at \$5 per month.

The circumstances proved, of the testator being in the capacity of an overseer with defendant, of his working five hands on his plantation, and the defendant having re-

ceived the proceeds of one or more of the cotton crops, are too vague and inconclusive to prove that defendant acted as his agent in the purchase of this woman. Besides, it was proved by *Brister*, the sheriff, that the defendant had been in the habit of advancing monies on account of the testator; and the testimony of *Covington* went to establish the fact, that after the sale, and when the testator acknowledged that he had the woman on hire from the defendant, he admitted at the same time, that he was indebted to the defendant, by stating that whenever he paid up *Rogers*, *Rose* was to become his again. The verdict of the Jury upon the evidence, is conclusive of the fact that the defendant did not purchase as agent.

The ground most strongly relied on by the counsel for the plaintiffs, is the first taken in the brief, that of misdirection of the judge, in stating to the jury, that a sheriff's sale of a negro under a *Fi. Fa.* need not be evidenced by a return on the execution or a bill of sale, but might be proved by parol testimony. As respects personal property, the law is very clear, that it passes by delivery; and unless some particular reason could be shown why a discrimination should be made in the case of a sheriff's sale, it would seem to follow, that a sale legally made by a sheriff, accompanied by delivery of possession, would fall within the same reason which governs in other cases, and would be as effectual to transfer a chattel interest as a sale made by any other individual. By the levy made, the sheriff had acquired a special property in the woman and was as much entitled to sell as the owner himself, before any had been created. If the purchaser was satisfied with a title thus acquired, and was willing to depend upon the notoriety of the transaction, and the regularity of the sale for his security, it was certainly competent for him to do so. A bill of sale from the sheriff might perhaps have better perpetuated the evidence of a right which he had acquired by his purchase, but it is the sale itself and payment of the money, by the purchaser, which passes the right of property in the chattel sold. As respects a bill of

sale for personal property sold by a sheriff; whatever doubt might have been entertained formerly when sheriffs were in the habit of insisting upon purchasers' accepting such evidences of their title, and demanding payment for such bills of sale, no doubt can possibly remain at present, since the passage of an act in 1808, (*2 Brev. 227,*) wherein it is enacted, "that any person or persons who may hereafter become purchasers of personal property at any sheriff's sale within this state, shall not be compelled to take a bill or bills of sale, for the property so purchased by him or them, nor to pay for any bill of sale without the purchaser should think proper to demand the bill of sale for the property so purchased by him or them, any law to the contrary notwithstanding; and in case the purchaser should demand a bill of sale, then the sheriff shall charge therefor not more than two dollars." In this case the purchaser made no such demand of the sheriff; and this clause in the act would seem in itself a full answer to the first ground taken in the brief, so far as respects the title of the purchaser, whatever negligence might have been practised afterwards by the sheriff as to a return upon the execution, if that indeed were legally necessary to effectuate the purchaser's title. But a return to a *Fi. Fa.* is not necessary to effectuate the purchaser's title; it is the sale alone which gives the title. In *4 Comyn's Digest 123, tit. Execution*, it is said, that a sale by the sheriff continues good, though the judgment be afterwards reversed, for the money only shall be restored.

By the English authorities it would seem, that a sheriff need not return a *Fi. Fa.* (*4 Com. Dig. 123,*) but by several acts of assembly of this state, it is made the duty of the sheriff to make returns on executions. By an act passed in 1791, it is required, that sheriffs shall be bound to make return of the executions lodged in his office on oath within ten days after the return day, with a full and particular account of the levies or sales by him made, and of the money in his hands. (*2 Brev. 216.*) By an act passed in 1799, (*2 Brev. 223,*) a penalty is imposed on

sheriffs who shall refuse or neglect to make returns to executions ; but there is nothing in those acts which has the slightest tendency to impair a title acquired at sheriff's sale, on his default to make the required return. For his neglect, he is made to forfeit a sum not less than forty nor more than two hundred dollars, to any person who shall sue for the same, and is not to be exonerated from such other pains and penalties as by law they are subject to. In *Johnson's cases* (vol. 1, 155,) the chief justice, in delivering the opinion of the court, in the case of *Jackson ex dem. Kane & Kane vs. Sternbergh*, and where the subject matter was real estate, as respects the return of the sheriff to the execution under which the estate had been sold, observed, "But the sheriff's return in my opinion was not essential to the title of the purchaser ; that title was not created by, nor dependant on, the return, but was derived from the previous sale made by the sheriff, by virtue of his writ. In the case of *Simonds vs. Catlin*, (2 *Caine Rep.* 63,) Justice *Kent* observes, "It is not requisite to the validity of the proceedings on execution, that the writ should ever be returned."

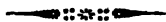
But why should the plaintiff in this action endeavor to make this neglect of the sheriff a ground of their recovery? Have they any doubt of the fact, that this negro woman was levied on by the sheriff of the district, and sold under the *Fi. Fa.*? Is it doubted, that the defendant became the purchaser at the sale, and that he paid the sum of 301 dollars, at which she was knocked off to him, and that this money went in discharge of a debt due from the plaintiff's testator? It would have been in my opinion competent for the court, on the trial of this case, to have ordered the sheriff to make such a return then on the execution as corresponded with the facts which had taken place, but his testimony as given in, superceded, in the opinion of the court, the necessity of his doing so, and the purchaser may now demand a bill of sale, should he think it necessary. I can see no reason in this case for

disturbing the verdict which has been given by the jury, and am of opinion, that the motion should fail.

Justices *Colcock*, *Richardson*, and *Huger*, concurred:

Evans, for the motion.

Witherspoon, contra.



F. W. R. BROADERS vs. N. WELSH and JAMES R. CARTER.

It is not necessary to issue a *Fi. Fa.* against the principal, before proceedings against the bail; a *Ca. Sa.* only is necessary.

THIS was a proceeding against the bail, tried before Mr. Justice *Colcock*, at Sumter district, Fall Term, 1820.

The proof was, a judgment against the principal, a *capias ad satisfaciendum*, and a return of *non est inventus*, which the Presiding Judge decided was sufficient, and a verdict was accordingly given against the bail.

The defendant appealed on the ground taken below, that the plaintiff should also have issued a *feri facias* against the property of the principal, and had a return of *nulla bona* before he could proceed against the bail.

Mr. Justice *Colcock* delivered the opinion of the Court.

This case has been decided by the Court on various occasions, and indeed admits of no doubt. (1 *Con. Rep.* 319.)

By the act of 1809, all bail are now to be considered as special bail, (that is, bail above, or bail to the action,) and by the Common Law it is only necessary to issue a *Ca. Sa.* and have a return of *non est inventus*, in order to proceed against this kind of bail; and this is obvious from the stipulations and responsibilities of bail to the action, which are, that they will pay the debt or render the body of the principal.

Now why issue an execution against the principal? It is unnecessary to say the least; the *Ca. Sa.* is a demand

on the bail to deliver the body, or pay the debt ; if they fail to do the first, they may do the second act ; if they fail to do the latter, they must do the former ; and a *scire facias* issues against them to compel payment.

It may be of importance to remark on the use of the term, in the act of 1785, that Mr. *Pendleton*, who introduced the act, has clearly misapplied the terms common and special bail, and hence arose great confusion. By the Common Law, (*Tidd's Practice*, 211. *Com. Dig. tit. Bail*.) common bail were merely nominal, (*John Doe & Richard Roe*.) The object was to give jurisdiction to the court. Special bail was bail below or bail to the sheriff, which was two or more real and responsible persons, who stipulated that if the defendant be condemned in the action, he shall satisfy the costs and condemnation or render himself to the custody of the sheriff, or that they will pay the costs of condemnation for him. (*Tidd's Practice* 211. *Comyn's Dig. tit. Bail*.) These (bail) might afterwards become bail to the action, or bail above, by which they acquired the right to surrender the principal, in case he did not surrender himself, or comply with the other conditions of the recognizance.

By the act of 1785, when common bail is mentioned, bail to the sheriff, or special bail is meant ; and when the term special bail is mentioned, bail to the action, or bail above, is intended. This explanation of the use and meaning of the terms common and special bail, is necessary to the correct understanding of the decisions of our Courts and construction of our acts.

It is then clear, that no other execution than a *Ca. Sa.* is necessary, before proceedings are had against the bail.

The motion is discharged.

Justices *Nott, Johnson, Gantt, Richardson* and *Huger*, concurred.

WILLIAM TRAPP vs. JAMES M'KENZIE.

Where an action of trespass is commenced against A. and B. and a verdict is found against A. but B. is found not guilty; B. is entitled to tax his costs against the plaintiff.

KERSHAW, November Term, 1820.

This was a rule on the clerk, to show cause why he should not tax costs under the following circumstances: William Trapp had brought an action of trespass against *William Matheson* and the said *James M'Kenzie*, for entering his enclosed lot in Camden, and taking away several bales of cotton. The Jury had found a verdict in favour of *William Trapp*, against *William Matheson*, but had found *James M'Kenzie*, "not guilty." The plea was a joint plea, and the subpœnas joint, but the appearance several.

The Presiding Judge, Mr. Justice *Richardson*, decided, that the rule should be made absolute; and that the plea and subpœnas should be taxed as well as the judgment and execution.

A motion was now made to reverse the decision, upon the grounds, that there is no law in this state, which entitles one defendant to costs where a verdict is given against his co-defendant in trespass.

Mr. Justice *Richardson* delivered the opinion of the Court.

The act of 1791, (1 *Faust*, 5. 1 *Brev. Dig.* 339,) declares, "that the several and respective fees herein after mentioned, &c. shall be paid, &c. for the different services in the respective suits, &c. in lieu of all other demands, &c." And the same act repeals all other acts upon the same subject, (fees.) The clause first recited, renders any litigant, who may employ an attorney, liable to him for certain fees, according to the specific professional services performed, and the invariable construction placed upon the same clause, has been, that such litigant, if successful

in his suit at law, or in his defence, may recover over against the opposite and unsuccessful party, the like fees by way of reimbursement for his expenditure sustained in such suit or defence. Now there can be no doubt that *James M'Kenzie*, was liable to his attorney, for the appearance, plea, subpoena, judgment, &c. in this case. And he is as much within the reason and expression of the act, as any other successful litigant. The verdict proves that he had been sued improperly and illegally. Though in the right, he was mulct in costs by a groundless suit, brought against him. Like every other successful party in a suit, he should then recover over his costs expended.

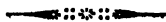
But it is asked, how are we to divide a joint plea, joint subpoena, &c. ? The answer is plain. Whether the plea be joint or several, the party is liable for each to his attorney, and he may recover over to the extent of his own liability and no more.

Again, it may be asked, if there had been several defendants acquitted, could each recover over for the same joint plea, &c. and filed by the same lawyer ? The answer is equally plain. They could by no means do so. Several defendants would, in such case, be liable to their own lawyer, only for one plea, &c. and many defendants, who had been acquitted, could recover over no more than any one defendant might, who had been solely acquitted. The motion is therefore discharged.

Justices *Colcock*, *Nott*, *Johnson* and *Huger*, concurred.

Blanding & Holmes, for the motion.

Levy & M'Willie, contra.



JAMES M'DOWALL vs. RICHARD BRANHAM, SOPHONISBA E. M. BRANHAM, his wife, surviving Administratrix of EDWARD WINGATE.

A. took a judgment of assets *quando acciderint* against an administratrix; and after said judgment, certain property which was claimed by the administratrix in her own right, (which was not mentioned in the

appraisement of the intestate's estate, nor stated in the account of the administratrix rendered to the ordinary,) was declared by the constitutional court liable to the intestate's debts: A. then commenced an action of debt on his judgment, *Held*, that the property, decided by the constitutional court to be liable to the payment of the intestate's effects, having been in the possession of the administratrix before the judgment of assets *quando acciderint* could not be considered as assets, came to the hands of the administratrix since the former judgment, and therefore not liable to the plaintiff's judgment.

THIS was an action of debt on judgment of assets *quando acciderint* against *Sophonisba E. M. Wingate*, now *Branham*, and *Joseph Wingate*, administrator, and *Administratrix* of *Edward Wingate*, deceased, taken and signed upon the 26th April, 1810, upon a note given by *Edward Wingate*, deceased, after his intermarriage with *Sophonisba E. M. Wingate*, dated the 27th of February, 1807. The negroes *Hannah*, *Bob*, *Sam*, *John*, *Rachel*, *Paul*, and *Nancy*, (children of *Hannah*) *Muhata*, and *Jack*, came by or belonged to *Sophonisba E. M. Wingate*, and were in the possession of *Edward Wingate*, deceased, from the time of his intermarriage with *Sophonisba E. M.* until his death, and remained in the possession of *Sophonisba E. M.* from the death of her husband, *Edward Wingate*, until her intermarriage with *Richard Branham*, and have been ever since and are now in the possession of the defendants. But said negroes were included in a marriage contract between *Edward Wingate* and *Sophonisba E. M.* made before their intermarriage, and dated the 27th April, 1805, and were neither mentioned in the appraisement of *Edward Wingate's* estate, nor stated in the accounts his administrators rendered to the ordinary, as they were claimed by *Sophonisba E. M.* as her separate estate, by virtue of said marriage contract.

On the 2d of December, the constitutional court, in the case of *Boatwright & Glaze vs. The Admors. of Edward Wingate*, declared said marriage contract void as to the creditors of *Edward Wingate*, deceased, and liable to the payment of his debts.

It was contended, upon the trial on the part of the plaintiff, that said negroes were to be considered as assets come to the hands of the administrators of *Edward Wingate*, deceased, and liable to the payment of said debts, at and from the time of said decision. But the Presiding Judge, (Mr. Justice *Gantt*,) charged to the contrary, and in conformity with said charge, the jury found a verdict for defendants.

The plaintiff moved the constitutional court for a new trial, upon the ground: That the Presiding Judge misdirected the jury whose verdict was contrary to law and the above mentioned evidence, in as much as said negroes were assets come to the hands of *Edward Wingate's* administrators, and liable to the payment of said debts, at and from the period of said decision, notwithstanding judgment of assets *quando acciderint* had been taken.

Mr. Justice *Gantt* delivered the opinion of the Court. The facts in this case are admitted by the counsel, and the law of the case, in my opinion, is very clear and conclusive, that the negroes in question are not liable to the plaintiff's demand. Much reliance has been placed upon the decision of the constitutional court, in the case of *Boatwright & Glaze vs. The Admors. of Edward Wingate*, but it can have no possible bearing on the present action. This action is founded on a judgment heretofore rendered, and any recovery in it must be according to the terms of that judgment; now the terms of it are, that the plaintiff was to have satisfaction for his debt, out of assets of the intestate, which should come to the hands of the administrators after that judgment, and it is admitted, in the case stated, that those negroes were in the hands of the administrators when the judgment was given. Why did not *M^r Dowell*, the plaintiff, contest the truth of the plea, knowing as he must have done, that those negroes were in the hands of the administrators? This was the course pursued by *Boatwright & Glaze*; they took issue on the

plea of *plene administravit*, and the property embraced by the marriage contract alluded to, was held liable to the debts of the intestate. If the verdict of the jury had been against them on the issue, and no appeal had been taken, they then would in point of law have been precisely in the situation of *M'Dowell*, the plaintiff, respecting the property in the marriage contract. The plaintiff in this action, by taking his judgment of future assets, has admitted the facts, that the property contained in the marriage contract, was not liable for his debts; and what a party admits in pleading is as conclusive of the fact admitted as if it had been established by the verdict of a jury. The decision in *Taylor vs. Holman*, (*Buller's N. P.* 169,) is a direct authority for the present case. The defendant there had put in the plea of *plene administravit*. The plaintiff, in that case, like *M'Dowell* in this, had taken judgment of assets *quando acciderint*. The plaintiff then, as *M'Dowell* here, brought an action on that judgment, suggesting a *devastavit*. Lord Mansfield would not allow the plaintiff to give any evidence of effects come to the defendant's hands before the judgment, saying, that the plaintiff had admitted, that the defendant had fully administered to that time. In the case of *Mara vs. Quinn*, (6 *Dunford and East*, 1,) Lord Chief Justice Kenyon says, "when an executor pleads *plene administravit*, the creditor has an opportunity of denying the truth of that allegation, or if it be true, he may admit it; if he deny it, the enquiry is then to be gone into, on the trial of such an issue; if he admit it, he takes judgment and prays, that his debt may be levied of such assets as may afterwards come to the hands of the executor to be administered. But the season when the creditor must ascertain, whether or not, there be any assets in the executor's hands, is when the issue of *plene administravit* is tried, that question is settled by the judgment given on such plea;" and he further says, "that such should be the rule of law, for if it were permitted to a creditor to litigate a second time, that which

has been once settled between the parties, either by a verdict or admission, the executor would be harrassed and involved in infinite expense and litigation." Mr. Justice *Lawrence*, in delivering his opinion in the same case, cited the case of *Noel vs. Nelson*, (1 Ventr. 94,) and the case of *Dorchester vs. Webb*, (Cro. Car. 373,) in which it was considered, that the admission of the truth of the plea of *plene administravit* operated as a bar to the creditor claiming any other assets than those that the executor should receive afterwards.

This principle of law therefore appears to have been firmly established, and founded in correct reason and sound sense. A judgment is the sentence of the law pronounced by the court, upon the matter contained in the record. Every judgment by confession is an admission, both of the fact and the law arising thereon, and it is not competent for a capricious plaintiff, in a second action, to gainsay or deny what he has admitted in a former to be true. Perhaps at the time of taking his judgment, he reflected, that the property in question, belonged to the administratrix before marriage, and by contract was to have been settled upon her; that the contracting parties, from ignorance of the law, had by mistake recorded the deed of settlement in an improper office, whereby the purpose for which it was made, had been frustrated, and disdaining to take an illiberal advantage against an unfortunate woman whose support depended upon her being able to retain this little pittance, the generosity of his nature induced him to waive an advantage which, in strictness of law, he might have taken, but which justice and right seemed to forbid. I wish he had adhered to this correct dictate of a feeling heart. His present attempt to make this property liable for the payment of his debt, is in opposition to an established principle of law, and which I am happy to believe, in this case, goes in support of what is strictly just and equitable.

It is the opinion of the court, that a new trial should be refused.

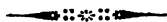
Justices *Johnson*, *Richardson*, and *Huger*, concurred.

Mr. Justice Colcock:

I concur in the general doctrine of the law, but I do not think the case embraced in the law.

Gregg, for the motion.

Stark, contra.



A. BENSON, Admor. vs. RICE & BYERS.

A sale by an administrator is valid, though a will be afterwards discovered, and the administration revoked.

TRIED before Mr. Justice *Johnson*, at Spartanburgh, Spring Term, 1820.

In this case it appeared, that the ordinary set aside the will of *John Turner*, on the ground of insanity, in the testator, and granted letters of administration to *Rebecca Turner*, who sold the property by order of the ordinary. *Sarah Turner* purchased the property in contest, at the sale of the administrator. Five years after, the ordinary reversed his former decision.

The only question presented in this case, was, whether the purchaser, at the administrator's sale, can hold the property purchased after the will is established?

The Presiding Judge decided against the purchaser, and for the defendant.

A motion was now made to reverse the decree; because the ordinary having set aside the will and granted administration, the sale is valid.

Mr. Justice *Colcock* delivered the opinion of the Court.

In this case there is no fraud alleged on the part of the administrator, and it is certainly different from the concealment of a will. "If administration be regularly granted, and afterwards, for cause, repealed, all lawful acts by the first administrator remain good; so if administration be regularly granted to him to whom it does not belong, and afterwards repealed upon a citation, all acts by

the first administrator are good; as if he gives the goods of the intestate to another. (1 Com. Dig. 375, tit. Administrator, b. 8. See also 2 Jac. L. D. by T. E. Tomlins.) Where an administration, which has been granted, is properly revoked, the latter administrator may sue the former for money had and received, or trover for any goods remaining in his possession, by him converted, or not duly administered. Any other doctrine would be fraught with the most monstrous inconvenience. The community who are not under the authority of judicial power, should be certain of protection, in their rights. The motion must be granted.

Justices *Johnson*, *Huger*, and *Nott*, concurred.



RICHARD B. HARRISON vs. WILLIAM HOLLIS, Senr.

Where a purchaser at Sheriff's Sale does not record his title, it will not affect the title of a subsequent purchaser at Sheriff's Sale, without notice of the first purchaser's title.

A Court of Law cannot notice a resulting trust, it belongs exclusively to the Court of Equity.

THIS was an action of trespass to try title to land, tried at Fairfield, Fall Term, 1820, before Mr. Justice *Nott*.

It will be unnecessary to go into a detail of all the circumstances which came out on the trial. It will be sufficient to state, that some time anterior to the year 1799, *William Hollis*, senr. the defendant, purchased the land in question, of *Jesse Havis*, and took his bond to make him titles, when the purchase money should be paid. In the year 1799, the money was paid, and *Havis*, by the directions of the defendant, made titles to *W. Hollis*, junr. son of the defendant. Defendant gave as a reason for having the title made to his son, that he was indebted to *M'Cra & Cantey*, and if the titles were made to him, the land

would be taken from him for the payment of that debt. *W. Hollis*, junr. being a minor, continued to live on the land with his father; some time after this, General *Cantey* obtained a judgment against *W. Hollis*, senr. and in 1804, had this land sold as his property, and purchased it in himself and took the sheriff's title for the same. He then permitted *W. Hollis*, senr. to live on the land as his tenant, and he and his son continued to live there together, until the year 1816, when *W. Hollis*, junr. died. But previous to his death (in the year 1815) a judgment was recovered against him, for one hundred dollars. In the year 1817 or '18, the land was sold as the property of *W. Hollis*, junr. to satisfy that judgment, and purchased by the plaintiff. Upon his statement of facts, the jury found a verdict for the plaintiff; and a motion was now made for a new trial, on two grounds:

1st.—Because the titles were made to *W. Hollis*, junr. for the purpose of defrauding *M'Cra & Cantey* out of the debt due to them by *W. Hollis*, senr. and were therefore void:

2d. Because *Wm. Hollis*, sen. having lived on the land more than five years, as the tenant of General *Cantey*, acquired a title by possession for him.

Mr. Justice *Nott* delivered the opinion of the Court.

In considering the several questions which arise out of this case, we must regard General *Cantey* as he actually is, the real defendant; and as connected with that view of the case, it is necessary to notice an important fact which is not stated in the brief, to wit: that the sheriff's deed to him has never been recorded. That fact gives a complexion to the case which supercedes the necessity of considering the first ground made for a new trial; for admitting the fraud to exist, there is no proof that the plaintiff was a party or had any knowledge of it; and being a *bona fide* purchaser for a valuable consideration, without notice of General *Cantey's* title, was entitled to recover. But what is the nature of the fraud complained of? II.

Hollis, senr. never had a right to the land, and he could not be compelled by this court to take a title to himself to enable him to pay his debt ; directing the titles to be made to his son, was not therefore such a fraud upon *M^r Cra & Cante*y, as this court can notice, because the land was never tangible by them. Setting aside this deed could not vest the land in old *Hollis*, and of course *Cante*y can have no right. And it is only with reference to creditors, that it can be considered fraudulent, for it is certainly good as between the parties.

It has however been contended, that young *Hollis* ought to be considered as a trustee for his father, and that the sale by the sheriff was therefore good. But the doctrine of implied or resulting trusts belongs exclusively to the courts of equity, and cannot be reached by this court. This court cannot travel out of the deed itself, for its construction. We can receive evidence *aliunde* to show, that a deed is fraudulent and void, but not to give it a different operation, than what it expresses upon its face.

2d.—With regard to the second ground, the possession of the son was coextensive with that of the father, and in such case, the possession would enure to the benefit of him who had the right. In any view of the case, therefore, the plaintiff is entitled to retain his verdict ; and this motion must be refused.

Justices *Colcock*, *Richardson*, *Gantt*, and *Huger*, concurred.

Clarke & Gregg, for the motion.

Peareson, contra.

JAMES DENTON & Wife vs. JOSEPH ENGLISH.

An executed contract, though founded on an immoral consideration, is binding on the parties to it, at Common Law.

THIS was an action of trover, tried before Mr. Justice Colcock, at Columbia, 1818, to recover the value of a number of slaves. Ten of them were claimed by the plaintiffs under a bill of sale from *Wm. Fitzpatrick*, who had a wife then living, to *Mrs. Denton*, (then *Miss Gillespie*,) dated 27th May, 1798. This bill of sale was signed and sealed by *Fitzpatrick*, and money was the consideration expressed. The defence *quoad* the negroes mentioned in the bill of sale, was, that the true consideration was a subsequent illicit cohabitation between the parties, and being *contra bonos mores*, was void.

The Jury found a verdict for the plaintiff as to part of the slaves, but as to those mentioned in the bill of sale, the verdict was in effect for the defendant, as it is agreed that their value was not included in the verdict.

From the view taken by the Court, the facts proved in support of the defence, which were very voluminous, are superceded, except so far as they go to prove that this was an executed contract, which consisted of the signing, sealing and delivery of the bill of sale, and a possession under it during the lifetime of *Fitzpatrick*, so far as such a possession was consistent with the parties living together, and separate and entire possession after his death, up to the time of the conversion of the defendant, and a provision in the last will and testament of *Fitzpatrick*, allowing *Miss Gillespie*, (*Mrs. Denton*,) whom he made his sole executrix, a compensation for the service of the negroes for the time they were employed by him. With regard to the facts which went to prove, that the true consideration of the bill of sale was a future illicit cohabitation between the parties, it is sufficient to remark generally, that the Court saw nothing in them so much opposed to the

finding of the Jury as to authorize granting a new trial on the grounds arising out of them.

The grounds of the plaintiff's motion for a new trial, arise principally out of a supposed misdirection of the Presiding Judge, in relation to the evidence of illicit cohabitation, and are now unimportant, as the case turns on a single question presented in the plaintiff's ground; it is whether at Common Law, an executed contract, founded on an immoral consideration, is or is not binding on the parties to it?

Mr. Justice *Johnson* delivered the opinion of the Court.

The question propounded assumes two positions. 1st. That this was an executed contract. 2d. That it is not affected by any statutory laws.

To support the first of these positions, it will only be necessary to remark that an executed contract consists in the performance of every thing necessary to be done according to the terms of the contract by the party contracting, so as fully to invest the party contracted with, with dominion over the thing parted with. (1 *Powell on Cont.* 234.) The bill of sale which furnishes the only evidence of the contract, does not provide for any subsequent act to be done by *Fitzpatrick*, and Miss *Gillespie's* possession of the negroes under it, gave her complete dominion over the negroes mentioned in it. It follows, therefore, that this was an executed contract.

It is admitted, that the negroes mentioned in the bill of sale were not equal in value to the one fourth part of the real and personal estate of *Fitzpatrick* at the time of the execution of the bill of sale, so that the contract is not affected by the act of assembly of 1795, usually called the bastardy act, (1 *Brev.* 68,) which declares all deeds of gift, conveyances, legacies and devises, made in favour of an illegitimate child, or a woman with whom one lives in adultery, void so far as it exceeds the one fourth part of his real and personal estate, such person having a wife or

children living at the time. The question is therefore to be determined on the principles of the Common Law.

On the part of the plaintiff, it is conceded, that an executory contract founded on the consideration to which the question made supposes, I mean, in consideration of future cohabitation and prostitution, is void, as being *contra bonos mores*, and would impose no legal obligation on the parties. (1 *Powell on Cont.* 183.) The right of the plaintiffs to recover, therefore, depends upon the distinction between the legal effects of an executory and an executed contract, if there be any.

That there is a distinction, is, I think manifest. Mr. *Powell*, in his essay on contract, (1 vol. 200,) observes, "That although contracts or agreements respecting things which the law prohibits to be the subject of contracts, create no right, and consequently no obligation on either side, yet the law suffers them in some instances, nevertheless, after they have been carried into execution, to prevail contrary to its prohibition; for being executed, they are valid between the parties, although the law will not give its aid to assist either party in carrying them into execution; for the parties are looked upon to treat together as if there were no law about the matter, and so to renounce the benefits which might accrue by the law to either of them; and therefore though they do ill to engage themselves, they ought in conscience to suffer their engagements, being executed, to continue in force, and neither of them ought to break without the assent of the other. (2 *Comyn on Contracts* 109.) The only exceptions to this rule which are noticed by *Powell*, are those which arise out of positive enactments by statute, when the remedy is expressly given or when it is necessary to enforce the general provisions of the statute. These statutes are classed—1st. Into such as are founded on general reasons of public policy—and 2d. On such as are intended to protect weak and necessitous persons from being overreached, defrauded, or oppressed. To the first of these classes of prohibited contracts, the common law rule, that when the

parties are *in pari delicto melior est conditio possidentis*, applies, and it is only in cases arising under the 2d class of contracts prohibited by statute, that a remedy is given. (*Powell* 202-3-4.)

I have been induced to notice the doctrine arising out of the construction of prohibitory statutes, under the impression, that all the difficulty which exists has arisen out of confounding these decisions with questions arising at common law, for after a careful research, I have not been able to find a single exception in cases arising on common law principles, to the general rule, that when the parties are *in pari delicto melior est conditio possidentis*. And no possible case has presented itself to my mind, which would constitute an exception. The act of assembly usually called the bastardy act before referred to, as a legislative interpretation of the common law, furnishes a strong argument, that this case at least was not an exception to the rule. That act restrains the party from bestowing more than one fourth of the value of his real and personal estate on a bastard child, or a mistress, if the donors have a wife or children. Now if such a disposition had been wholly void at common law, the prohibition in this statute was idle and nugatory, and the statute, instead of imposing restraints, should have legalized such a disposition of the one fourth part of his estate to such purposes.

The application of this rule to the present case is easy. *Fitzpatrick* at least was *in pari delicto*. In the absence of proof, the presumption is, that he pursued and seduced Miss *Gillispie*, and the facts reported abundantly prove it. I think therefore, that the plaintiff's motion for a new trial ought to prevail.

Justices *Gantt* and *Richardson* concurred.

Mr. Justice *Colcock* dissented.

Gregg, for the motion.

Blanding, contra.

SAMUEL WOODFOLK, assignee of WOODFOLK, vs. JOHN K. LESLIE.

Any mere written promise to pay money unconditionally, is a promissory note; therefore a paper, signed by defendant, stating, that he had received a certain sum from the plaintiff which he would return when called for; or a paper acknowledging, that the defendant had borrowed a certain sum of the plaintiff, is a promissory note.

An affidavit to hold to bail requires, that a specific sum shall be charged and the cause of action plainly set forth.

A creditor may hold his debtor to bail upon one cause of action, and declare on that and another also; but should the verdict be given on the second cause of action, the defendant may take advantage of it, when sued on his bond, but not on motion.

The law does not require, that an affidavit to hold to bail should be of the exact amount which may eventually be found due; for the verdict cannot alter the regularity of the former proceedings.

THIS was an action of assumpsit, tried before Mr. Justice *Richardson*, upon an instrument of writing nearly in the words following: "Received of Woodfolk four hundred dollars, to be returned when called for, — day of — 18—.

"J. K. LESLIE."

On the same piece of paper the words, "borrowed of Woodfolk, ten dollars, J. K. LESLIE," were endorsed, and also an assignment to the plaintiffs. At the trial there appeared likewise endorsed a receipt for \$ 50.

The jury found a verdict for \$ 360, with interest from the filing of the writ by the sheriff.

After the verdict, a motion was made to discharge the bail, because the affidavit was insufficient; because, as was said, there was a material variance between it and the cause of action, &c. The affidavit stated, that the defendant was indebted to the plaintiff \$ 360, "as assignee of a promissory note," &c. The motion was overruled and the appeal to this court was to reverse that decision, upon the same grounds.

Mr. Justice *Richardson* delivered the opinion of the Court.

In order to hold a debtor to bail, the law requires, that a specific sum of money shall be charged to be due to the plaintiff, and the cause of action plainly set forth in the affidavit. (*Sell. Prac.* 105-6-7-8-9. 1 *Tidd's Prac.* 157. *Peck & Hood vs. Van Evour*, 1 *Nott & M'Cord* 581, and cases there referred to.) These indispensable requisites have been strictly complied with in the affidavit before us.

It was argued, that the instrument declared upon, is not a promissory note, and therefore the cause of action misrepresented in the affidavit. But *any mere written promise to pay money unconditionally, is a promissory note*, and such is plainly the purport of the instrument declared upon. The acknowledgment, that the consideration was money "*borrowed*," does not alter the character of the contract; and the form of assignment was unobjectionable. The plaintiff was then the assignee of a promissory note.

Again; it was observed, that there were two instruments of writing declared upon, (one a note for \$ 400, and another for \$ 10 endorsed.) But I apprehend, that a plaintiff may hold his debtor to bail for one cause of action, and still declare upon that, and another too. Should the verdict be given upon the second cause, the defendant may take advantage of it, whenever sued upon his bond, but not upon motion. In a mere *ex parte* motion to discharge the bail, it would be dangerous and unjust to make collateral issues, or enquire into the possible merits of the case. Upon such a motion, all we can do is to see, that the affidavit is strictly correct, and that some count in the declaration is strictly conformable thereto.

It was also said, that, as the affidavit stated the plaintiff to be assignee of a promissory note, in as much as there was endorsed a payment of \$ 50 upon the paper containing both notes, there could have been but \$ 350, and not \$ 360, due upon the note referred to in the affida-

vit, and so the affidavit was erroneous in charging too much by \$ 10, to be due. But two satisfactory answers may be given to this position. 1st. The law does not require the affidavit to hold to bail to be of the exact sum which may be eventually found due, *i. e.* the verdict cannot alter the regularity of the former proceedings. The receipt too, is no part of the record, but is the defence set up by the defendant, and we are not to travel out of the record of proceedings made by the plaintiff. The verdict may be and usually is something more or less than the sum sworn to; yet the bail is liable to any sum within the amount of his bond. But let us suppose, that the affidavit must state exactly the principal sum due, or less; and that this court will regard the receipt as part of the plaintiff's case. Then too the affidavit is strictly correct, under a very rational construction verified by the verdict itself; the two notes were for \$ 410, *i. e.* the one for \$ 400 and the other for \$ 10, and a general receipt for \$ 50 is endorsed; these three are on the same paper; now is it not as rational to apply \$ 10 of the payment of \$ 50, first in discharge of the \$ 10 and then \$ 40 in part payment of \$ 400? which application of the \$ 50 leaves just \$ 360 due, and that too upon the note of \$ 400. Surely this is just, and if necessary to the support of the proceedings, may be done justly and without violence to fair construction or probable intention. Admitting then every view taken by the counsel, still the conclusion is, that the motion must be discharged.

Justices *Johnson*, *Gantt*, and *Huger*, concurred.

Mr. Justice *Colcock* dissented.

Carter & Baker, for the motion.

S. D. Miller, contra.

JOHN KING, *ads.* JAMES FERGUSON, *et al.*

Where a will was thirty-three years old, and had been proved before the ordinary, and the hand writing of the testator and subscribing witnesses proved, although no evidence was given of possession under the will, or that the witnesses were dead or out of the state : *Held*, that it was sufficient evidence, upon which a Jury might find the will to be genuine.

After an interlocutory order for judgment has been set aside, and the defendant has plead the general issue, he will not be entitled to plead in abatement, or have the benefit of that plea in his defence.

Where a testator, by will, gives his executors a power to sell his land for the benefit of his heirs, or to divide and allot the land among them, the executors are nothing more than attorneys or commissioners to sell, and the fee simple of the land vests in the heirs until the executors make the sale or division, agreeably to the will.

THIS was an action of trespass to try title and recover damages ; tried at Spartanburgh, Fall Term, 1820.

The plaintiffs produced a grant to *Thomas Ferguson*, for 500 acres of land, dated 9th September, 1774, and then produced the will of *Thomas Ferguson*, dated 24th June, 1785. The testator died in 1786. The hand writing of the testator and the subscribing witnesses to the will was proven, but there was no proof that the witnesses were dead, or out of the state. The will was admitted as evidence on this testimony, and *its antiquity*. The will devised the land in dispute, to be sold by his executors, for the payment of his debts, funeral expenses and pecuniary legacies, and other purposes in the will mentioned ; and that if his executors should be of an opinion that it would be more for the benefit of the estate, that the said land should not be sold, then the testator devised the same to his sons, who should survive him at his death, when his executors should divide the said land between them. There was no testimony to show that the executors had or had not sold the same, or decided it would be a benefit to the testators estate not to sell the said land ; or that they had made any division as directed by the will. The plaintiffs further proved, that they were the sons

and children of the sons who survived the testator, and that there had been a continued minority since the death of the testator, in his sons and son's children, and that a minority then existed in one of the plaintiffs, to wit, *Eliza Ferguson*, who was about 19 years old, and had intermarried with Mr. *Bacot*, since the commencement of this action, and after issue joined.

The defendant then produced a deed from *Jahn Tollison* to himself, for fifty acres, covered by the plaintiff's claim, and proved a possession of the same for twelve or thirteen years under the said deed. The Jury, under the charge of the Judge, found a verdict for the plaintiffs. The defendant moved for a new trial on the following grounds :

1st. Because the Court misdirected the Jury, in stating to them, that the will under which the plaintiffs claimed the land, conveyed a fee to the plaintiffs, when no part of the will did convey a fee to the plaintiffs under the evidence then before the Court.

2d. Because the Court misdirected the Jury in stating to them that the will was sufficiently proven if they believed the testimony, as the will was thirty years old, although there was no proof of any possession under the will, nor was it shown that the witnesses for the will were dead or out of the state.

3d. Because the Court refused to permit the defendant to plead the intermarriage of one of the female plaintiffs in abatement of the action as to her.

Mr. Justice *Richardson* delivered the opinion of the Court.

There were several other grounds taken at the trial, and contained in the notice for a new trial, but being obviously untenable were not relied upon in the argument. That a will, like any other ancient instrument of writing, after a lapse of thirty years, and provided some account of its situation, during that time, has been given so as to prevent suspicion of its being antedated or of any other

imposition. That such a will requires not as full proof to authenticate it as is required in more modern instruments, has been well settled. (*Phillipps*, 385. 5 *Johnson*, 144. 2 *Espinass' Digest*, 493. *Duncan vs. Beard*, ante, 400.) No particular rule can be laid down for such cases. The will was thirty-three years old, and had been proven before the ordinary in 1786, which would probably have been sufficient evidence of its being genuine, but the hand writing of the testator and of the witnesses to it was moreover proven, which was abundant testimony, upon which the Jury might find the will to be genuine.

The ground, that the defendant had a right to plead in abatement, or to have the benefit of that plea in his defence, is equally untenable. The general issue had been made up, and that too after an order for an interlocutory judgment. The defendant had no right to a plea in addition thereto, unless it went to the merits; a mere dilatory plea could not be filed of right. (*See a Rule of Court*. 1 *Const. Rep.* XIII.)

We come then to the only ground truly relied upon in the case, to wit: Was the fee vested in the plaintiffs without any act on the part of the executors? The construction must be made upon the following clause of the will, to wit: "Item, I do hereby authorize and empower and direct my executors, or such of them as do and shall qualify and take upon him or them, the burden and execution of this my will, or the survivors or survivor of them, his executors and administrators, to sell and dispose of all the rest, residue and remainder of my real estate, whether in town or country, and execute and deliver unto the purchaser or purchasers, good and sufficient titles and conveyances in fee simple, and the money arising from such sale, I desire may be applied for and towards the payment and satisfaction of all and singular my just debts and pecuniary legacies, funeral charges and other uses in this my will expressed;" and "I do hereby authorize, empower and direct my executors, hereinafter mentioned, or such of them as do or shall qualify and take upon them

the burden and execution of this my will, or the survivors or survivor of them, his executors and administrators, to part, share, divide, allot and deliver over unto my children, their part of my said estate, real and personal, pursuant to this my will, and that such division and allotment shall be final and conclusive, and binding on all parties concerned. Item, my will further is, in respect of the rest and surplus of my real estate, and I do hereby authorize and empower my executors, hereinafter named, and the survivors or survivor of them, and the executors and administrators of such survivors or survivor, (any thing herein contained before to the contrary, notwithstanding,) to part, share and divide the said rest and surplus of my said real estate, equally, share and share alike, among all my sons that may be living at the time of my death, or with which my said wife may be ensient. If my said executors should be of opinion that it will be more advantageous that my said estate should not be sold, as is herein before by me directed, which division and allotment when so made by my executors, among my sons, I do hereby confirm unto my said sons, and to their and each of their heirs and assigns for ever."

The evidence proved that the plaintiffs or some of them were the heirs of the testator, which would be enough to vest the fee in them, unless by the will he had devised it to another. To that, the true question is, did the fee vest in the executors, or do the words of the will require some act to be done by the executors, before the fee can vest in the plaintiffs. I am of opinion, that under the words of the will as well as by operation of law, the fee vested in the plaintiffs. This is obviously the intention.

The end in view was, 1st. To give to the executors the power of selling the land for the benefit of the devisees. This is no more than a power of attorney to sell, and has never been construed to convey any estate to the executors. (1 Bac. 318.) They are simply attornies for such purpose, and have no other power than what is plainly expressed. Their powers are to be construed strictly. 2d. The exe-

cutors to have power to divide the residue of lands (their allotment to be conclusive among the sons, &c.) This is no more than a modification of the power to sell. It is to be strictly construed and to be extended only to the end in view, (*i. e.* to divide.) They are made umpires to divide, and may or may not exercise their power. In the mean time the joint and several rights of the heirs or devisees attached, subject only to the partition or allotment which the executors may make, but which they may never make.

The error in the defendant's argument was in the assimilating of this case to those in which an estate is given to trustees to be disposed of either at discretion, or limited in a certain way expressed, as in 3 *Vesey, junr.* to A. to dispose of as he thinks proper, gives a fee. (See 11 *East*, also, 288. 9 *Johnson*, 104. 2 *Fonb.* 53, 93. *Coke* 335. 1 *Roberts on Wills* 449, &c. In all these cases, an estate is given: But in the one before us, only a power to act for others; the words are, "I authorize, empower, and direct, my executors to allot, divide, &c. if not more advantageous to sell," &c. which are the very words used in the former clause, giving the power to sell, *i. e.* "I authorize, empower, and direct, &c. to sell, &c." The different powers given are evidently uncoupled with a conveyance of any estate. To sell, or divide, requires no interest in the attorney or commissioner appointed for such purpose; and in the case before us, the executors are as attorneys or commissioners for such purpose.

The motion is refused.

Justices *Nott*, *Gantt*, and *Johnson*, concurred.

Gist & *Roddy*, for the motion.

M' Duffie, contra.

CHARLES & JOHN SPANN *ads.* JOHN BLOCKER.

▲ court of common pleas has no power to order a sale of lands, except in cases of intestacy.

THIS was a motion to set aside a judgment in partition, for irregularity, made before Mr. Justice *Johnson*, at the Fall Term of 1819, for Edgefield, who overruled the motion.

The grounds of appeal were the same which were urged in the court below, for setting aside the judgment :

1st.—Because the summons in partition was irregular, and no order founded thereon could bind the defendant.

2d.—If the defendant had been made a party, still the only proper order would have been, that a division should be made because there was no allegation, that the joint tenancy arose under the statute of distributions.

3d. That judgment by default upon this summons only, admitted what the Court could legally do, namely divide the land, and that the order to sell was extra judicial, and not binding on the defendant.

Mr. Justice *Gantt* delivered the opinion of the Court.

I shall waive the expression of any positive opinion upon the first ground taken in the brief. The case of *Surtell ads. Brailsford*, (2 Bay, 333,) that the Court will not unravel proceedings, and set aside judgments after several years acquiescence, will admit, in my opinion of exceptions. Cases might occur which would admit of no other remedy, and there ought to be a means of redressing every possible injury. The particular circumstances of the case must, in every instance, be such as to justify the Court in the exercise of so high a discretion, and when they exist, it is proper and right that it should be called forth in protection of the law, and the rights of individuals.

In this case, however, I should conceive the irregu-

larity complained of, in the copy summons, would not, in itself be sufficient to authorize the interference of the Court to vacate the judgment.

But the 2d and 3d grounds, which will be considered as one, certainly exhibit as strong a case for the interference of this Court, as could well be presented to its discretion.

The object of the summons was to enforce a division of an estate held in joint tenancy.

The commissioners in their return, recommend a sale of the land, and this return is made the judgment of the Court, and the land by order of the Court, has been sold. By what authority could such a judgment be rendered? It is only in cases of intestacy, that the Court of Common Pleas have power to order a sale of lands for the purpose of division. The statute of 31 *Henry* 8, c. 1, if indeed that statute should be considered as of force, but which I conceive not to be in the case, affords no warrant for the mode of procedure adopted in this case. By that statute, all joint tenants, and tenants in common, may be compelled to make partition between them by the writ *de partione facinda*, in like manner and form as they, by the Common Law are compelled to do. Now by the Common Law, there was but one way of compelling partition, and that was, when one or more sued out a writ of partition against the others. The sheriff was to go upon the lands and make partition thereof by the verdict of a Jury, then empannelled, and was to assign to each of the persons his part in severalty. But this compulsory mode has never been pursued in this state, and if a legal one, still the statute furnishes no authority to sell, but partition is alone to be made by a division of the land into as many parcels as there are persons. The act of 1798, giving the remedy for a division of lands holden in coparcenary, joint tenancy, and tenancy in common, and under the sanction of which all estates of this kind are divided in this state, is most to be considered. The preamble to the clause which furnishes the mode of making partition in those cases is in itself a legislative construction, that the statute of *Henry*

is not of force. The words are, "whereas no provision hath hitherto been made for the division of lands in this province held in coparcenary, joint tenancy and tenancy in common." It then goes on to enact, that in all cases where any lands shall be given, or descend to any persons in coparcenary, joint tenancy, or tenancy in common, and no provision made by will or otherwise, how such lands shall be divided, when, and as soon as any one of the coparceners, joint tenants or tenants in common shall be of the age of twenty-one years, he or she shall and may apply to the Court of Common Pleas, for a writ of partition. The Court is to issue the writ, directed to five persons, to *make division of the lands*, either in entire tracts, or in parcels as shall be most beneficial to the persons interested, and the commissioners are to make return thereof to the Court, to remain of record, which partition and division is to be final and conclusive to all parties concerned. In this act, there is not one word said about a sale of the lands, nor was it ever in the contemplation of the legislature that the commissioners should be invested with a power to recommend, or the Court of Common Pleas, with a right to order a sale in any such case. It is a substitute for the Common Law, made by compelling a division of the lands into separate and distinct parcels, so that each may enjoy in severalty the portion to which he or she may be entitled. It is under the act of '91, and in cases of intestacy alone, that the Court of Common Pleas has power to direct a sale of lands, in order to a division among those entitled to distribution. Estates in joint tenancy, cannot, from their nature, arise in any case of intestacy; they can alone be created by purchase, and a conveyance of some sort becomes indispensable to the existence of such estate. It may in this instance have been created by will for aught I know, and then no division could be made under the act of '91, which applies specifically to cases of intestacy. Whether by will or any other mode of conveyance, the Court had no power to make the return of the commissioners, recommending a sale, the judg-

ment of the Court; it was an extra judicial, and void order, and as such, should be set aside.

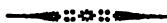
I am of opinion, that the division in the Court below, was erroneous, and that the motion should prevail for setting aside the judgment and proceedings in this case.

Justices *Colcock, Nott, Richardson* and *Huger*, concurred.

Mr. Justice *Johnson*, dissented.

S. D. Miller, for the motion.

M' Duffie, contra.



The Administrators and Administratrix of JAMES W.
DARBY, deceased, *vs.* REUBEN S. RICE.

It is a general rule of evidence, that the declarations of a party shall not be admitted in his favor, but they may be admitted in those cases, where, from the nature of the thing, it is impossible to furnish any other proof of the fact.

THIS was an action of assumpsit, to recover the balance of the amount of sales of four bales of cotton, sold by the defendant for the plaintiff's intestate.

The defendant, who was a merchant, furnished him with an account current, in which the four bales of cotton were credited, which overpaid the defendant's store account one hundred and forty-nine dollars, thirty-seven and a half cents, to recover which, this action was brought, opposite which balance, the defendant wrote, "received the above in full;" and signed his name, "R. S. RICE." The defendant did not deny the account to be in his hand writing.

The defendant then proved by Mr. *Bernhard*, that on the day the account was dated, the deceased passed by his store, with whom the deceased had an account, and told the witness if he had his account made out, that he would pay him; (this was about 10 or 12 o'clock.) The wit-

ness had not his account ready, but set his clerk immediately to make it out. The deceased had come in a direction, as if directly from the defendant's store, which was only twenty or thirty yards distant. The witness sent his clerk down the same evening to the deceased's house, and got his money.

The defendant then offered to prove, by this witness, that he, the witness, was owing the defendant, and as soon as he got the money from the deceased, he went to pay the defendant with the same money ; and on sight of the bills, the defendant challenged them, and said you got that money from *Darby*, to which the witness answered yes ; but the Court refused to admit this testimony to go to the Jury.

The defendant then proved by *William Rice*, that he the witness had left a note of hand, which he had on the deceased, for \$24, in the hands of the defendant, at the request of the deceased, to be paid on the settlement of their account, and that as the deceased was about to set out for Philadelphia in a few days, with the defendant, he, the witness, also left in the hands of the defendant, between fifty and one hundred dollars, in Georgia and North-Carolina bank bills, for the defendant to pay the deceased with, as the deceased had some accounts in the village to settle, and those bills would answer as well as any, and that the said witness had not seen the note or bills since.

The defendant then proved by *George W. Rice*, in the morning on which the settlement was made between the defendant and the deceased, when the deceased came into the store, he said he wanted a final settlement of his account, as he was afraid he was not long for this world. That defendant immediately got his account, and a settlement was made. That the defendant then went to the drawer, in which he kept his money, and took a parcel out of it, and was counting it to the deceased, down on the counter. The deceased then had the account in his hands, and at that moment, he the witness was called out of the store, on some other business, and did not see the deceased

take the money up off the counter. That when he the witness came in again, he saw no money, and the deceased observed that if he had two or three more settlements made, his business would be finished. That there was no other person in the store at the time the defendant was counting the money on the counter, but the deceased, to whom he was to pay money. And the defendant proved by other witnesses, that the deceased died that night or the next after.

The defendant further proved by *Mr. Norris*, another merchant in the village, that according to the usage and custom of the merchants of that place, in making out accounts similar to the one on which this action is founded, if this account had been presented to him, he should have concluded that it was settled and paid.

To rebut the defendant's evidence of payment, the plaintiff proved by one witness only, that the deceased had a paper in his hand, and handed it to the defendant, and asked him to sign, set down, or strike the balance. The defendant took the paper and went to his desk, as if to write or do so, and then returned it to the deceased. But this witness could not, nor did not pretend to say that the account on which this action is founded was the same paper; neither did he see or hear any talk of any money at the time.

The Jury found for the plaintiff \$149 37 1-2 cents. From which verdict, the defendant appeals, and moves for a new trial on the following grounds:

1st. Because the verdict is contrary to law and evidence, in as much as there was sufficient evidence of payment, to have authorized the Jury to find for the defendant, as by law they were bound to have done.

2d. Because the Presiding Judge refused to admit the declarations of the defendant, as proved by *Mr. Bernhard*, to go to the Jury.

Mr. Justice Johnson delivered the opinion of the Court.

The Court is of opinion, that a new trial ought to be granted on the second and last ground. There are perhaps as few exceptions to the general rule, that the declaration of a party shall not be given in evidence for him, as to any other; and they exist only in those cases in which, from the nature of the thing, it is impossible to furnish any other proof of the fact; for instance, if it should become a question whether a party knew the Multiplication Table, it could only be established by hearing him repeat it; what he has said, therefore, must be resorted to, to prove that he knew it. Upon this principle, the declarations of the defendant, so far as they went to prove that he knew the Bank Bills, which were paid to him by the witness, *Bernhard*, and that they had been in *Darby's* possession, were admissible, because, the fact was not susceptible of any other proof; and although not conclusive, as to his having paid the money to *Darby* on this account, yet it furnished a circumstance, which ought to have gone along with the other to the Jury. This Court is of opinion, that the Presiding Judge erred, in taking them from the Jury, and that a new trial ought to be granted.

Justices *Colcock*, *Nott*, *Richardson* and *Huger*, concurred.

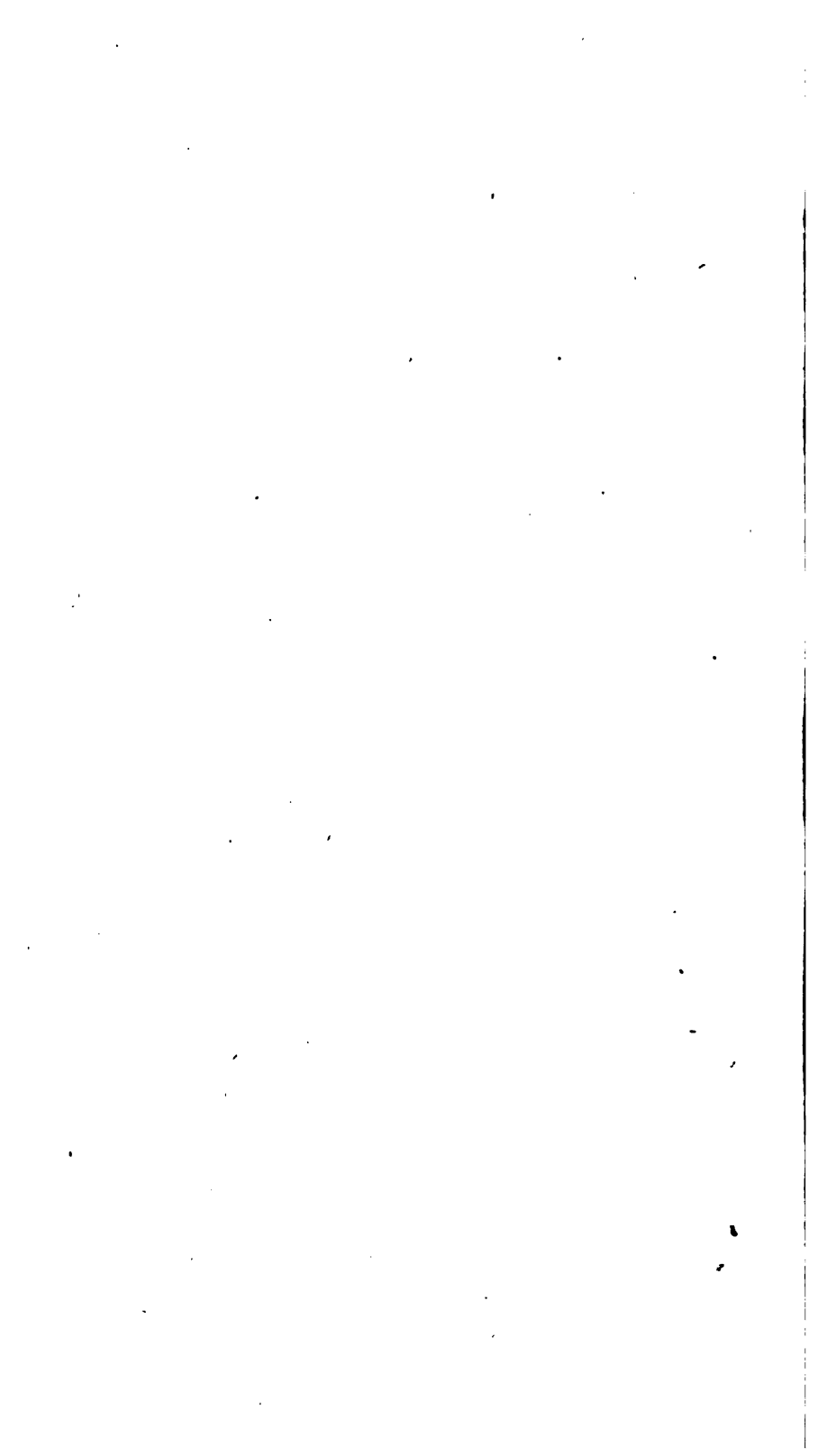
Mr. Justice *Gantt* dissented.

Gist, for the motion.

Thomson, contra.

N. B. The Judges who concurred with Judge *Bay*, in the case of *Robson vs. Wall*, ante, 498-510, are, Justices *Colcock*, *Johnson* and *Huger*.

B.



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1. Where a defendant gave his note to the plaintiff, on condition, that the plaintiff would give him a note which he held on a third person, the plaintiff cannot recover on the note given by the defendant, unless he deliver the note on the third person to the defendant, agreeably to their agreement. *Caldwell vs. M'Kuin*, 555

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See City Guard.

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ASSUMPSIT.

See Evidence 7. Warranty. Damages 4.

1. On an action to recover back money paid for prime coffee, which turned out to be damaged, the difference only between prime coffee and that of inferior quality, can be recovered.—*Wharton vs. O'Hara*, 65
2. An action for money had and received, will not lie to recover back the purchase money,

where the property has turned out to be unsound, unless there has been a return of the property, or at least a tender of it, or where there has been an entire failure of consideration. *Ib.*

3. Where the plaintiff advertised coffee as prime, and represented it as such, at the sale, (auction) though he exposed the bags containing the same, which might have been examined, yet he is liable to the purchaser for the deficiency, if damaged. *Ib.*

4. Forbearance to sue for a certain time, is a sufficient consideration for a new promise by the debtor, and for the non-performance of which assumpsit may be maintained.—*Mills vs. M'Lehan*, 133

5. When money has been paid for forbearance, it cannot be recovered back by the party paying, nor be the legal subject of a discount, *Ib.*

6. An action of assumpsit, for use and occupation, cannot be supported when the possession is tortious.—*Ryan vs. Marsh*, 156

7. In an action of assumpsit upon a warranty, it is not necessary to state in the declaration, that it was in writing.—*Wallis vs. Frazier*, 180

8. A. received from B. a certain sum enclosed in a memorandum of articles to be purchased for him in Charleston; before A. left home, some property of his brother was levied on, and to redeem it he used the money of B. and his own: When A. reached town he sold his cotton and received the money for it, and as he was going to purchase the articles

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for the plaintiff, had the whole amount stolen from his pocket: *Held*, that A. by applying the money of B. to his own use, became a debtor to B. for the amount, and was liable for it at all events.—*Ulmer vs. Ulmer*, 489

9. The Commissioners of a Lottery are bound by the terms of the scheme, which they have exhibited; and where they permit the time to elapse, in which the lottery was to be drawn by the scheme, without any drawing, a purchaser of tickets will be entitled to an action to recover back his money.—*Waddell vs. The Commissioners*, 550

ATTACHMENT.

See Sheriff 2, 3.

1. Neither of the attachment acts has prescribed the form in which bonds shall be given, previous to the issuing of the writ; and any will do, so that the condition be such, that the plaintiff can be made to respond in damages to the defendant, in case of any illegal conduct on his part.—*Leach vs. Thomas*, 110
2. No attachment shall be issued, until a bond has been given for double the amount for which it issues.—*Boyd vs. Boyd*, 125
3. Giving a blank paper, with the plaintiff's name signed thereto, is not a sufficient compliance with the attachment acts; and an attachment obtained thereon will be quashed on motion, *Ib.*
4. Where attachments had issued under the 5th and 6th clauses of the attachment act of 1785, the court refused to quash the attachments on affidavits, showing, that at the time the attachments were obtained and levied, the defendants were within reach of the ordinary process of law, and could have been arrested.—*Havis vs. Trapp*, 130
8. P. Grisham vs. Deale, *Ib.*

5. Where a writ of foreign attachment has issued against a defendant, who, at the time, was within the state, the court will, on motion at the first term, after the return of the writ, quash it, although it appear, that there was great reason to suspect, that the defendant had gone abroad, and that suspicion arising from defendant's own conduct.—*Degnan vs. Wheeler & Co.* 323
6. The court will not set aside a judgment obtained against a garnishee who fails to make a return, after a copy writ and a notice to make a return have been served upon him.—*Durant vs. Staggers*, 438

AUCTION.

See Assumpit 3.

BAIL.

See Sheriff 1.

1. Where a *fi. fa.* had issued against the principal to which there was a return of *nulla bona*, and a *ca. sa.* on which was returned *non est inventa*, and an action was then commenced against the bail, on the bail bond, *Held*, that the bail was entitled to the whole term after the service of the writ on him, to surrender his principal. *Davitt vs. Counsel*, 130
2. It is not necessary to issue a *fi. fa.* against the principal, before proceedings against the bail; a *ca. sa.* only is necessary.—*Broaders vs. Welsh*, 569
3. An affidavit to hold to bail requires, that a specific sum shall be charged, and the cause of action plainly set forth.—*Woodfolk vs. Leslie*, 585
4. A creditor may hold his debtor to bail upon one cause of action, and declare on that and another also; but should the verdict be given on the second cause of action, the defendant may take advantage of it, when sued on his bond, but not on motion. *Ib.*
5. The law does not require,

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that an affidavit to hold to bail should be of the exact amount which may eventually be found due; for the verdict cannot alter the regularity of the former proceedings. *Ib.*

BAR.

See Pleading 7.

BARON AND FEME.

See Evidence 12.

1. Where a husband died, leaving a widow and children, and the widow took possession of his property as administratrix, and before partition, she married and died, though her second husband be in possession of the property as administrator in right of his wife; yet it is not such a possession of his wife's choses in action, as to vest in him the one third coming to his wife; but he will be entitled to the one third of her third.—*Sturgineger vs. Hannah*, 147
2. And though he administer upon his wife's estate, and obtain possession, yet, he will be compelled to make partition. *Ib.*
3. Plaintiff's wife, with others, was entitled, under the act for the distribution of intestate's estates, to a share of real estate; and a writ of partition, under the act of assembly, was sued out, and an order for the sale of the property was obtained, and the purchase money paid into the hands of the sheriff, according to the order: The wife then died. It was held, that this was not such a reduction into possession by the husband of the wife's choses, as to consummate his right to the whole; but as his wife died without issue, he was entitled under the act to one half.—*Hood vs. Archer*, 149
4. A feme covert acting as a sole trader, may make a bond; but this power is confined to such bonds only as relate to, or are in some manner connected with, her business as a

sole trader.—*M' Dowall et ux. vs. Wood et ux.* 242

BASTARD.

See Recognizance.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Limitation of Actions 1, 2.

1. Where the defendant gave the plaintiff a note of hand, on a third person, in payment for property purchased; which note had been given for money won on a horse race, therefore void, *Held*, that the plaintiff may recover the value of the property from defendant, although the note was never presented to the maker for payment.—*Beard vs. Brandon*, 102
2. A. was indebted to B. \$ 50, for so much money won at cards, and B. was indebted to C. \$ 25, for goods sold and delivered to him, previous to that time. B. offered to give A. a discharge from his debt, upon condition he would become paymaster to C. for the debt which he owed him, and procure a discharge for the same. C. accepted the note of A. and gave B. a discharge. *Held*, that the note was good. *Bowen vs. Doggett*, 127
3. Where the drawer of an inland bill of exchange informed the payee, that he had withdrawn the funds, on which the bill was drawn, from the hands of the drawee, *Held*, that a presentment of the bill for payment was unnecessary.—*Sutcliffe & Bird vs. M' Dowall*, 251
4. The doctrine of inland bills applies equally to checks upon banks. *Ib.*
5. The indorsee of a promissory note cannot recover of the indorser, unless he prove a demand made upon the maker, and notice of nonpayment to the endorser: And there is no difference in this respect between a note endorsed before and after it became due.—

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M'Farlane vs. Administrator of Shackleford, 283

6. The insolvency of the maker of a promissory note, will not dispense with the necessity of a demand, and notice to the indorser of nonpayment. *Ib.*

7. Where the maker of a promissory note had made his mark to it, and the subscribing witness was out of the state, proof of the handwriting of the subscribing witness was held sufficient.—*Whitaker vs. Bussey,* 374

8. Although the drawer of a bill of exchange, between the making and the time at which the bill becomes due, draws all his funds out of the hands of the drawee, this alone will not dispense with the necessity of the payee's presenting the bill for payment when it becomes due, and giving the drawer notice of nonpayment.—*Edward & Haig vs. Moses,* 433

9. If the drawer of a bill of exchange has no effects in the hands of the drawee from the date till the time of payment, demand and notice are dispensed with: But there should be a total absence of all effects during all that time. *Ib.*

10. And it should appear, that the drawer knew, that there would be no effects; and that where the effects failed from accident, and did not reach the drawee, demand and notice are not dispensed with, *ut semble,* *Ib.*

11. An agent of the plaintiff cut a bank bill into two parts to transmit to the plaintiff by two different mails; one half of the bill arrived safely, but the corresponding half was stolen from the mail; the plaintiff then carried the half in his possession, to the bank from whence it issued, and demanded the amount, but the bank refused to pay more than half the sum when only half the bill was produced; *Held,* that the plaintiff was en-

titled to recover the whole amount of the bill.—*Patton vs. The Bank,* 464

12. Cutting or severing a bank bill, destroys its negotiability. *Ib.*

13. Where a demand has not been made on the maker of a promissory note, and the endorser, under a knowledge of this fact, agrees to pay it, a presentment to the drawer will be presumed, and it is unnecessary to prove it.—*Hall vs. Freeman,* 479

14. Any mere written promise to pay money unconditionally is a promissory note; therefore a paper signed by defendant, stating, that he had received a certain sum from the plaintiff which he would return when called for; or a paper acknowledging, that the defendant had borrowed a certain sum of the plaintiff, is a promissory note.—*Woodjolk vs. Leslie,* 585

BOND.

See Interest 1. *Attachment* 1, 2, 3. *Baron and Feme* 4.

1. A bond was given by two obligors, to three obligees, one of the obligees (A.) who had received the property, for which the bond had been given, gave the obligors a bond of indemnity. *Query?* If it be a release?—*Haskell et al. vs. Keen et al.* 160

2. The bond of indemnity is an acknowledgment on the part of A. that he had received the value for which the original bond was given, and though it may not be a discharge, yet, as between A. and the obligors, under our discount law, it would have been a bar to A's recovery on the bond, and ought to be regarded as a payment to A. who was competent as one of the obligees to receive and discharge the obligors, *ut videtur.* *Ib.*

3. A confession by one co-obligor, that he had never paid, and that he believes the other

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- had not, is not sufficient to rebut the presumption, that the other obligee had paid. *Ib.*
 4. After twenty years a bond will be presumed to have been paid, unless such presumption be rebutted. *Ib.*
P. S. Smith vs. Richardson, n. 166

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See Evidence 1, 3.

CITATION.

1. No action will lie against an administrator or his securities, until they have been cited to appear before the ordinary, to account for the actings and doings of the administrator; and a decree of the ordinary obtained thereupon.—*Simkins vs. Powers,* 213

CITIZEN.

1. Under the act of congress of 1802, respecting naturalization, (requiring that the alien should, three years at least, before his admission as a citizen, give notice, that it is his intention to become a citizen, &c. and that at the time of his application to be admitted, must declare on oath, that he will support the constitution,) it will not be a compliance with the requisitions of the act, if the alien at the time of his giving notice of his intention to become a citizen, take the oaths required at the time of his admission to citizenship, unless he take them at the time of admission also.—*Richards vs. M' Daniel,* 352
 2. A certificate of naturalization irregularly obtained, may be set aside. *Ib.*

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See Jurisdiction 6, 8.

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1. A commission is not indispensable in order to discharge the duties of a public office, *ut semble.*—*The State vs. Billey,* 356

CITY GUARD OF CHARLESTON.

1. The city guard of Charleston have the right to arrest persons committing affrays or breaches of the peace, without any warrant.—*City Council vs. Payne,* 475

COIN.

See Tender.

COMMISSIONERS OF THE ROADS.

1. The act of 1788, gives the commissioners of the roads no power to lay out roads for individuals.—*Singleton vs. The Commissioners,* 526
 2. And if the act of 1788, had given the commissioners power to lay out roads for individuals, it would be limited to such roads as are necessary, and could not be extended to such as are only convenient. *Ib.*
 3. The word *path* in old acts of assembly is synonymous with *road.* *Ib.*
 4. The commissioners of the roads are not liable to a private action for neglect of duty. *Young vs. The Commissioners,* 537

COMMON CARRIER.

1. A boatman is a common carrier, and is liable for all losses, except those occasioned by the act of God and the enemies of the country.—*Harrington vs. Lyles,* 88

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CONSTITUTION OF THE U. S.

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1. An executed contract, though founded on an immoral consideration, is binding on the par-

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ties to it, at common law.—
Denton et ux. vs. English, 581

CORONER.

1. By the act of 1797, the coroner is required to issue his warrant to a constable, to summon a jury of inquest; and where a juror is summoned by the coroner in person, the summons is illegal.—*City Coroner vs. Cunningham*, 454
2. The act of 1798, has not changed the manner of summoning jurors. *Ib.*

COSTS.

See Practice 2, 6, 14. New Trial 2.

COURT.

See Jurisdiction.

COURT MARTIAL.

See Trespass 3. Prohibition 3.

1. The captains of militia companies, for defaults of attendance at petty musters, are authorized by law to hold courts martial, without any order from any of the field officers of the regiment.—*State vs. Wakely*, 412
2. The captain, ordering the court martial, may preside as president; and is the one to approve of the sentence of the court. *Ib.*
3. A militia man is not allowed to send a substitute. *Ib.*
4. Under the act of 1808, (enacting that "every private who shall wilfully neglect to turn out at any ordinary muster, shall be fined the sum of one dollar and fifty cents, and fifty per cent on the amount of his general tax,") a sentence in these words and figures, viz. "\$ 1 50 and 50 per cent," is sufficiently definite. *Ib.*

COVENANT.

1. Defendant by deed granted, bargained, sold, and released, to the plaintiff a tract of land, to hold in fee, and by the said deed bound himself, his heirs, executors, &c. to warrant and for ever defend the premises

to the plaintiff, his heirs, &c. against every person whomsoever, lawfully claiming or to claim the same or any part thereof. The plaintiff may maintain an action for the breach of such covenant, before eviction, by showing a paramount title in a third person.—*Mackey vs. Collins*, 186
S. P. Furman vs. Elmore, n. 189

CRIM. CON.

See New Trial 6. Witness 4.

CUSTOM.

1. On an action brought to recover freight for carrying rice to Charleston, in plaintiff's boat; defendant may give evidence of a custom of the river to look to the produce and to the consignee alone for freight. *Middleton vs. Hayward*, 9

DAMAGES.

See Assumpsit 1, 2, 3. New Trial 2, 5, 6, 7. Warranty 5, 6.

1. In actions of slander a new trial will never be granted on the ground of excessive damages, unless they so far exceed all proportion to the injury, as necessarily to strike every one, at once, with the conviction, that the Jury were led away by public prejudice or private feeling.—*Davis vs. Davis*, 81
2. When to an action on a note given for the purchase of land, a defence is made, that there was a deficiency, the rule for ascertaining the deduction in the price is the *relative value* of the land, and not according to the *average price*.—*Peay vs. Briggs*, 184
3. It is unusual for the court to grant a new trial on the ground of excessive damages where injuries have been done to property under highly aggravated circumstances; the amount must always be a matter for the sound discretion of a jury.—*Lloyd vs. Manpoey*, 447
4. In cases of fraud, and other cases sounding in damages, the

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jury may give a verdict for the whole amount of injury sustained, or even imaginary damages in an action of assumpsit. *Rose & Rogers vs. Beattie*, 538

DEED.

See Evidence 11. *Fraud* 6, 7. *Sheriff* 3.

1. A deed cannot be admitted, as an ancient deed, by only giving an account from whence it came, &c.; but there must have been possession under it.—*Middleton vs. Mass*, 55

2. A deed may be presumed from length of time.—*Arthur vs. Arthur*, 96

3. The act of 1785, for recording conveyances, embraces sheriff's as well as other deeds, therefore a deed from the sheriff, if not recorded within six months, is void as to subsequent purchasers.—*Massey vs. Thomson*, 105

4. *Query?* Whether notice will dispense with recording? *Ib.*

5. Where a sheriff's deed recited, that a *fi. fa.* under which the land was sold, had issued from a particular district, when in fact it has issued from another; this misrecital will not be fatal, as a ground of nonsuit.—*Harrison vs. Maxwell*, 347

6. In a sheriff's deed, a recital of the authority under which he has sold, is not indispensably necessary. *Ib.*

7. A bare recital in a deed, is not a substantial and efficient part of it. *Ib.*

8. Where a father had a deed written, of certain negroes, to his children, and he makes a delivery of the negroes, and immediately afterwards executes the deed, this will be regarded as one entire transaction.—*Foster vs. Cherry*, 367

9. Where a deed of negroes has been made to a person, and the property delivered, it will be regarded as a delivery to the uses pointed out in the deed. *Ib.*

10. If a deed be certain in part, and uncertain in other parts, it is not therefore void. Such construction shall be given *ut res magis valeat quam pereat*. *Duncan vs. Beard*, 400

11. Where a deed is made to A. and his associates, and A. makes a deed of the land, a deed from the associates will also be *presumed*, (if necessary) after a great lapse of time, and possession under A. *Ib.*

DEMURRER.

See Pleading 1, 8.

DEVISE.

See Will.

DISCOUNT.

See Assumpsit 5. *Damages* 2. *Bond* 2.

1. In an action against an administrator, an order drawn by the plaintiff in favor of a third, on the intestate, found among the intestate's papers, and not rebutted by other evidence, is good as a discount, and will entitle the defendant to a deduction *pro tanto*.—*Nehbe vs. Price*, 328

2. Where an administrator commences an action for a demand due intestate, the defendant may plead a discount.—*Mayhew vs. Flake*, 398

3. Where an administrator commences an action within the nine months allowed him by law, the defendant may plead a discount.—*Cunningham vs. Baker*, 399

DUEL.

1. A challenge to fight a duel under the act of 1812, may be given verbally, and whether the words used amount to a serious challenge to fight, or are the mere ebullition of passion, is a question for the jury.—*State vs. Stricklin*, 181

EJECTMENT.

See Trespass to try Title.

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EVIDENCE.

See Custom 1. *Duel Deed* 1. *Witness. Sheriff and Sheriff's Sale* 11. *Will* 10, 12, 13.

1. A memorandum book, kept by the master-workman of mechanics, written some in ink and some with a pencil, is not admissible, with his (defendant's) oath to prove the loss of days work by plaintiff's slave, who was hired to the defendant: though that might have been the customary way of keeping such account.—*Barksdale vs. M'Kewn*, 17
2. A person cannot be made a party to a suit, except by process, or by consent; the only evidence of which, must appear from the records. And defendants' names, only appearing in the judgment, is not sufficient evidence.—*Marshall vs. Drayton*, 25
3. The slightest acknowledgment of a debt, is sufficient to take the case out of the statute of limitations.—*Burden vs. M'Elhenny*, 69
8. P. *Exors. Boyd vs. Exors. Carmichael, n.* 62
4. Defendant, referring the examination of the accounts to her agent, or to one acting as mutual agent, is thereby to be understood, as saying whatever shall be found due, I will pay. *Ib.*
5. In a question, whether there has been a marriage, proof that two persons have lived together, as man and wife, will be conclusive, if not rebutted; but like all other presumptive evidence, may be rebutted by circumstances or positive proof. *Allen vs. Hall*, 114
6. The declarations of either husband or wife, as to the marriage, are admissible. *Ib.*
7. Where an action is brought on a note, and the defendant gives in evidence, that the property, for which it was given, was defective, it is not necessary, that he should prove, that he offered to return the property, or that it was impracticable. That is only necessary where general *indebitatus assumpsit*, for money had and received, is brought for a total failure on a warranty, expressed or implied.—*Duncan vs. Bell*, 153
8. In an action for crim. con. the misconduct of the wife, before her seduction by the defendant, may be given in evidence.—*Torre vs. Summers*, 267
9. Under the act of 1721, authorizing attested copies of all records certified by the clerks of the court to be given in evidence, it will not be sufficient to produce extracts; the whole record must be given.—*Fance vs. Reardon*, 259
10. The rules of evidence are the same in criminal as civil cases.—*State vs. Rawls*, 331
11. In an action of trover for certain negroes where they had been formally delivered to the plaintiff and a deed executed to him at the same time for them, he cannot recover, unless he produce the deed, or show the loss of it. *Foster vs. Cherry*, 367
12. In an action, in which the husband is answerable in damages, the declarations of the wife cannot be given in evidence.—*Hawkins vs. Hatten, et ur.* 374
13. A deed thirty years old, may be given in evidence without proof of its execution, if accompanied with possession. (*Query*, as to a will?)—*Duncan vs. Beard*, 400
14. Papers, other than deeds, if found in the place in which they should be deposited, in pursuance of their object, that circumstance, added to their being thirty years old, will raise a presumption in favor of their authenticity; and when they are produced from their proper repository, and have been properly preserved, it will not, after a certain

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- time be necessary to prove them. *Ib.*
15. Where the subscribing witnesses to a will are dead, and no proof of their hand writing can be obtained, it will be sufficient to prove the handwriting of the testator. *Ib.*
16. The books of the owner of a ferry are admissible to prove an account for ferriage.—*Frazier vs. Drayton,* 471
17. Where several witnesses swore, that the rates of ferriage had been "fixed up in a conspicuous place," (agreeably to the act of 1798,) at the plaintiff's ferry at different times, though they could not remember as to one particular portion of time, it is sufficient evidence to support a verdict for the plaintiff, in an action brought by him to recover ferriage. *Ib.*
18. A Printer's books are only evidence to prove the authority for advertising, but the file of newspapers must be produced to show the performance of the printing alleged to have been done.—*Richards vs. Howard, n.* 474
19. The plaintiff was sued as security to a note, drawn by him and defendant, and separate judgments recovered against each; defendant paid up the judgment and his own costs, but not those of the plaintiff; the plaintiff sued for them, and produced a certificate of the attorney, (who died before the trial,) who had recovered the judgment against them, "that it appeared," plaintiff had paid his own costs: *Held*, that this was sufficient evidence, that plaintiff had paid the costs, and to entitle him to recover the amount.—*Thompson vs. Stevens,* 494
20. It is a general rule of evidence, that the declarations of a party shall not be admitted in his favor, but they may be admitted in some cases, where, from the nature of the

thing, it is impossible to furnish any other proof of the fact.—*Administrator Darby vs. Rice,* 596

EXECUTION.

See Fieri Facias.

EXECUTOR AND ADMINISTRATOR.

See Pleading 1, 2. *Limitation of Actions* 1, 2. *Warranty* 3. *Discount* 1, 2.

1. An estate is not bound by the contracts of an administrator. *Nehbe vs. Price,* 328
2. A sale by an administrator is valid, though a will be afterwards discovered, and the administration revoked.—*Benson vs. Rice & Byers,* 577

FERRYMAN AND FERRY.

See Evidence 16.

1. A ferryman is liable as a common carrier; and it seems the law gives him the right of judging, when it is safe and proper for him to cross or not.—*Cook vs. Gourdin,* 19

FIERI FACIAS.

See Bail 1, 2. *Deed* 3, 4, 5. *Sheriff and Sheriff's Sale* 10.

1. Money may be taken in execution, *ut semble*.—*Summers vs. Caldwell,* 343
2. A vested remainder in fee of land, may be levied on and sold during the continuance of a life estate, and while the tenant for life is in possession.—*Harrison vs. Maxwell,* 347

FORCIBLE ENTRY.

See Practice 3.

FRAUDS.

See Sheriff 3. *Wills* 1, 2, 3, 4.

1. Where a father purchased property with money out of his own estate, and drew a bill of sale of the same to himself, as agent to the trustees of his wife and children, and kept the same in secret, and used the property as his own, and afterwards sold the same to a bona fide purchaser, for a valuable consideration, without notice, the court will consider such bill of sale as fraudulent against

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- such purchaser.—*Gordon vs. Goodwyn*, 70
2. The court will require great strictness in proving, that the property was purchased by the trust fund, after appearing as the husband's, although it be expressed, in the bill of sale, to have been purchased by the trust fund. 7b.
3. A memorandum signed by the defendant only, whereby he agreed to deliver a quantity of cotton, takes the case out of the statute of frauds, though not signed by the purchaser. *Douglas & Co. vs. Spears*, 207
4. An unscaled instrument of writing in the form of a penal bond, whereby Thomas & A. B. Duren acknowledged themselves held and firmly bound in a certain sum, for value received, with a condition that the obligation shall be void, if the defendants should pay the half of a debt due by Duren & Ballard, is not void under the statute of frauds, as being an undertaking to pay the debt of a third person.—*Aiken vs. Duren*, 370
5. An agreement in writing to pay the debt of a third person without any consideration being expressed, is void under the statute of frauds.—*Stephens, Ramsay, & Co. vs. Winn*, n. 372
6. Where a person much indebted, made a deed without consideration, to one of his children, (out of several) of nearly all his property, and declared to a witness, that he did it to avoid paying a particular debt, *Held*, that the deed was fraudulent and void, as to creditors, under the statute 13 Eliz.—*Kerkley vs. Blakeney*, 544
7. Where a man owes a sum of money at the time of making a gift to his child, without consideration, and the money is never paid, the presumption of fraud can only be rebutted by showing very abundant property over and above the gift, kept and retained by the donor for the purpose of paying his debts: And if in the ordinary course of events, such property turns out to be inadequate to the discharge of his debts, the presumption of fraud remains, although the property reserved may have been deemed originally adequate to that purpose, if exclusively so applied. 1b.
8. In a written agreement to pay money on account of a third person, the words, "for value received," are a sufficient expression of consideration to charge the party, under the statute of frauds.—*Caldwell vs. M'Kain*, 555
- FREIGHT.**—See *Custom*.
- GAMING.**—See *Indictment* 2, 3, 4
- GENERAL ISSUE.**
See *Pleading* 1, 2, 6.
- GIFT.**
1. When a father, on the marriage of his daughter, permits property to go into her possession and remain a considerable time, it is sufficient evidence of a gift.—*Teague vs. Griffin*, 9c
- GRANT.**
See *Deed*.
1. A grant of an uninhabited portion of country, by a British governor, to A. and his associates, is not void for uncertainty.—*Duncan vs. Beard*, 400
2. Where a grant has once passed the great seal, it cannot be revoked, except by legal proceedings; even if the sovereign power should possess the power of itself of determining when a grant should be revoked, a second grant for the same land would not be considered evidence of revocation. 1b.
- HEIRS.**
See *Will* 8, 14.
1. If a man seized of lands, dies, leaving no issue or relations behind him capable of inheriting, his lands shall escheat to

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the state, rather than go over to aliens; but where there is any one of his blood capable of inheriting the fee of the lands, they shall go over to that one in preference to all others, nearer in degree, who are aliens.—*Scott vs. Cohen*, 293

2. A. a naturalized citizen of the United States, who was possessed of a considerable real estate in this country, by will devised a large estate in Ireland, to his brothers and sisters, and by the residuary clause, devised all his other property to his brothers and sisters, & their children, share and share alike, and appointed trustees (who were aliens) to sell, &c. B. one of the legatees, and a naturalized citizen of the United States, claimed all the lands in the United States, as the only one of the legatees, who could take by descent, the rest being aliens, *Held*, that on the death of A. all his real estate in this country, vested in B. and that after the death of B. his widow was entitled to dower in the same, although B. had in his lifetime, agreed, that the other legatees might come in and take their shares agreeably to the will of A. *Ib.*

INDICTMENT.

See *Robbery*. *Slave* 1, 2, 4, 5, 6, 9, 10. *Practice* 1, 3, 15. *Retailing*. *New Trial* 9.

1. The defendant was indicted for negro stealing under an act passed while South Carolina was a province; the indictment concluded "contrary to the act of the general assembly of the said state, in such case made and provided," and a motion made in arrest of judgment, because it was not an act of the "state" but of the "province;" *Held*, that the indictment was good.—*State vs. Turnage*, 158

2. An indictment under the act of 1816, to prevent gaming, a-

gainst a person for permitting persons to play at cards in her house, being a public house, is not good unless it state, that the persons were playing at such games as were not excepted in the act; and where a conviction has taken place on such an indictment, judgment will be arrested.—*The State vs. Reynolds*, 365

3. Where, in the enacting clause of an act, exceptions are enumerated, it will be necessary, in an indictment under the act, to negative the exceptions. *Ib.*

4. Where a man is indicted under the gaming act, for playing cards with three certain men, the indictment will not be supported by proving, that he played with a man not mentioned in the indictment.—*State vs. Rushing*, 560

INFANT.

1. An infant is only liable in his contracts for necessaries, and a horse will not be included in that denomination.—*Rainwater vs. Durham*, 524

2. Although an infant is liable for necessaries, yet only their value can be recovered. *Ib.*

INQUEST.

See *Coroner*.

INTEREST.

1. A bond with a condition, "that the lawful interest on the whole principal sum, shall be paid annually, together with one third part of the said principal sum, at the end of each year, until the whole be paid off," is not usurious. And the obligee is entitled to interest on the aggregate amount of principal and interest of each instalment, as it becomes due. *Gibbes vs. Chisoom*, 38

2. Interest is recoverable on judgments. *Ib.*

3. Where a payment is made, it goes in the first place to the extinguishment of the interest. *Admor. Norwood vs. Manning*, 395

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4. Though the whole amount appearing on the face of a judgment be paid, yet it must be deducted from the aggregate amount of principal and interest: And the balance is principal. *Ib.*
5. Whenever a specified sum of money has been paid by one man for another, and the amount and time can be ascertained by any memorandum in writing, legally adduced to prove the transaction, interest can be recovered *ut semble*.—*Thompson vs. Stevens*, 494

JUDGE.

1. When one judge has made an order, the operation of which is defeated by subsequent circumstances, a succeeding Judge may make such further order as is necessary to carry the first into execution.—*Public Works vs. Stark*, 337
2. Where commissioners have been appointed by a Judge under the act of 1819, to assess damages done by the board of public works to a citizen, and one or more of the commissioners is unable or refuses to act, a succeeding Judge can appoint other commissioners. *Ib.*
3. A succeeding Judge will not rescind an order made by a preceding Judge; but where a party thinks himself aggrieved by such order, the proper manner to procure redress is by appeal.—*Durant vs. Stagers*, 488

JUDGMENT.

See Interest 2, 3, 4. *Practice* 2, 5. *Title* 6, 7. *Verdict*.

1. Judgment will not be arrested upon objections not arising on the face of the record: Misdirection of the Judge can never be a ground.—*State vs. Heyward*, 312
2. A motion in arrest of judgment will prevail only where error is apparent on the face of the record. *Ib.*

3. A. took a judgment of assets *quando acciderint* against an administratrix; and after said judgment, certain property which was claimed by the administratrix in her own right, (which was not mentioned in the appraisement of the intestate's estate, nor stated in the account of the administratrix rendered to the ordinary,) was declared by the constitutional court liable to the intestate's debts: A. then commenced an action of debt on his judgment; *Held*, that the property decided by the constitutional court to be liable to the payment of the intestate's effects, having been in the possession of the administratrix before the judgment of assets *quando acciderint* could not be considered as assets, came to the hands of the administratrix since the former judgment, and therefore not liable to the plaintiff's judgment.—*M Dowal vs. Branham*, 572

JURISDICTION.

See Prohibition.

1. It is too late in the appeal court to object to the commission of the Judge; it ought to have been done at the trial.—*State vs. Anone*, 27
2. An ambassador or public minister of a foreign prince or state, is not amenable to the laws of the nation to which he is sent.—*State vs. De la Foret*, 217
3. The law of nations does not exempt a foreign consul from liability to the laws of the state in which he resides. *Ib.*
4. The federal courts have not exclusive jurisdiction with regard to offences committed by foreign consuls in the United States; but the consul is amenable to the laws of the state in which he commits an offence. *Ib.*
5. The act of 1818, increasing the jurisdiction of the inferior city court of Charleston, is

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constitutional.—*State vs. Hel-*
frid, 233

6. Every court acting clearly within its jurisdiction, in a case legally submitted, is independent of all others, to which no appeal is given.—*State vs. Wakely,* 410

7. A plaintiff cannot entitle himself to an action, in a court of limited jurisdiction, by releasing the interest, where the principal and interest would exceed it.—*St. Amand vs. Gerry. Brown vs. Same,* 478

JURY AND JUROR.

See Custom New Trial 4. *Practice* 1, 7. *Slave* 3.

1. Marriage is a fact to be left to the jury.—*Allen vs. Hall,* 114

2. Whether persons hold possession of land, as the tenants of another, is a question for the jury.—*Duncan vs. Beard,* 400

3. The act of 1816, allowing to a juror one dollar per day, for his services, has not repealed the part of the fee bill of 1791, allowing juries five shillings for every verdict.—*Clary vs. Wells,* 442

4. The jury have a right to retain the record on which they have found a verdict, until five shillings have been paid them. *Ib.*

5. The statute 33 Edw. 1. with regard to challenges of jurors, is of force in this state; and the solicitor can only challenge for cause.—*State vs. Barron-*
sine, 553

JUSTICE OF THE PEACE.

See officer.

1. The act of 1819, (enacting, that thereafter all justices, &c. then in commission, who had not qualified before the governor, shall within ninety days after the passing of the act, qualify before the clerk, &c.) does not embrace justices in commission who had qualified under the act of 1800.—*The State vs. Billey,* 356

2. It is not requisite to the validity of the office of justice of

the peace, that the incumbent should have signed the roll under the act of 1778. *Ib.*

3. A justice of the peace is legally qualified to act as such without a commission. *Ib.*

LARCENY.

See Indictment 1. *Slave* 1, 2, 3.

1. Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*.—*State vs. Gor-*
man, 90

LICENSE.

See Retailing. *Slave* 10.

LIMITATION OF ACTIONS.

See Evidence 3, 4.

1. The executor of A. was sued on a note of hand; plea statute of limitations; replication, that by the act of 1789, nine months are allowed to executors and administrators, after the death of their testator or intestate, before they can be sued, and that the plaintiff ought not to be barred, having been restrained by the aforesaid act nine months, from commencing his action; *Held,* that the plaintiff was allowed four years exclusive of the nine months. *Moses vs. Jones,* 259

2. The act of 1789, suspends the operation of the statute of limitations, nine months after the death of the testator or intestate, but does not take from the plaintiff any part of the four years allowed by the act of limitations. *Ib.*

3. Where a plaintiff commenced an action against the defendant for money which he had paid as security, to which the defendant plead the statute of limitations; *Held,* that the statute did not commence to run until the plaintiff paid the money for defendant.—*Thompson vs. Stevens,* 493

4. A war suspends the operation of the statute of limitations, between the citizens of the two countries for the time

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during which it continues.—
Robson vs. Wall,

498

LOCATION.

1. On a question of location, the course and distance of one line extended ten chains beyond a creek, and its parallel line also extended five chains beyond the creek, which creek (or river) formed a semi-circle, with the circumference turned from the centre of the tract in dispute; the plat represented the whole of the creek, in its course, as included in the tract: Upon this evidence, the jury found a verdict to the following effect, and it was supported by the court, viz. That the line should be closed by running a straight line from one point to the other, until it encountered the river, and then to follow that until it arrived at where such straight line would cross the river, and then to pursue it until it arrived at the other point.—*Coots vs. Mathews,* 99
2. Location is a question of evidence, and cannot be reduced to fixed and definite rules. *Ib.*
3. Course and distance must yield to actual marks, whether natural or artificial; but in the absence of these, course and distance must determine the location. *Ib.*
4. Where a question of location between the purchaser and vender, is doubtful, the purchaser will be concluded by his deed which called for a certain plat on a resurvey, which resurvey was present when the deed was made and referred to as the metes and bounds by which the vendor sold.—*Peay vs. Briggs,* 184

MALICIOUS PROSECUTION.

1. A memorial presented to a grand jury, complaining of the conduct of the plaintiff, who was a public officer, but not acted upon by the grand jury, is not such a prosecution, as

will support malicious prosecution.—*O'Driscoll vs. M'Burney,*

54

2. There can be no prosecution without an arrest. *Ib.*
3. Nor is the refusal of the grand jury to act upon it, a sufficient termination of the case to support *mal. pros.* for application may be made to another jury. *Ib.*
4. It is a necessary allegation, in a declaration for malicious prosecution, that the prosecution is at an end, and must be proven as laid.—*Thomas vs. de Graffenreidt,* 144
5. And the indictment showing that the grand jury had rejected the bill will not support the allegation, that the party had been acquitted. *Ib.*
6. The word, *acquitted*, means technically an acquittal on a trial by the petit jury. *Ib.*
7. The declaration must always state how the case was disposed of. *Ib.*
8. *Query?* Whether the grand jury, finding *no bill*, is such an end of the prosecution as is necessary to support this action; for another bill may be given out, unless the party be discharged from the court upon motion. *Ib.*

MILITIA.

See Court Martial 1, 2, 3, 4. *Prohibition.*

MONEY HAD AND RECEIVED.

See Assumpsit 1, 2, 3, 8.

NEW TRIAL.

See Damages 1, 3. *Verdict.*

1. In an action of trover against two defendants, where a conversion has been proven against but one, and a verdict found against both, a new trial will be granted, unless the plaintiff will discontinue as to the defendant, against whom no conversion was proved.—*Bates vs. Smith & M'Carthy,* 84
2. In an action for an assault and battery, where an actual battery was proven, although a jury may give merely nomi-

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- nal damages, yet, they cannot find a verdict for the defendant; and in such case, a new trial may be ordered, unless the defendant agree to pay the costs of the suit.—*Dinkins vs. Debruhl*, 85
3. Where there have been two concurrent verdicts, there must be manifest error or injustice to induce the court to grant a second new trial.—*Peay vs. Briggs*, 184
4. That which was a cause of challenge to a juror, shall not be made the ground of a new trial.—*State vs. Fisher*, 261
5. A new trial will not be granted on the ground of excessive damages in an action for Crim. Con.—*Torre vs. Summers*, 267
6. The court will not be disposed to interfere with the finding of a jury, and grant a new trial on the ground of high damages, where a wanton and aggravated trespass has been committed on the property of a plaintiff.—*Mathews vs. West*, 415
7. A new trial will not be granted on the ground, that a party was deprived of certain title papers by high water. *Id.*
8. Where a man is indicted for stealing a cow and calf, and no evidence is given as to the calf, and general verdict of guilty is found, a new trial will be granted.—*State vs. Bunten*, 441
9. Where in an action on the case for beating a negro, evidence of the defendant's character is given, to which no objection is made on the trial, it will not furnish a ground for a new trial.—*Lloyd vs. Monpoy*, 447
10. Where a new trial is moved for, on the ground, that one of the plaintiff's witnesses had been bribed to swear falsely, to which fact the witness makes affidavit, it will be sufficient objection to the admission of the affidavit, that a copy of it was not submitted to the plaintiff; but waiving that objection, a new trial will

not be granted on that ground *ut semble*. *Id.*

11. A new trial will not be granted on the ground of new evidence being discovered after the trial.—*Exors. Evans vs. Rogers*, 563

NONSUIT.

See Pleading 3.

OFFICER.

See Commission. Justice of the Peace. Trespass 3.

1. A judicial officer is not liable for an injury which may come to a party by reason of an error of judgment which the officer may have committed by his adjudication, in a trial before him.—*Reid vs. Hood & Burdine*, 168
- S. P. Young vs. Herbert, n.* 173

ORDINARY.

See Citation.

PARTITION.

See Baron & Feme 1, 2, 3.

PATROL.

See Slave 7.

PERJURY.

1. To constitute perjury it is necessary, that the oath relate to some matter material to the question in issue.—*State vs. Hattaway*, 118
2. It is not necessary, that the particular fact sworn to should be immediately material to the issue; but it must have such a direct and immediate connection with a material fact, as to give weight to the testimony to that point. *Id.*
3. Where a particular fact was material in the case, and the witness swore to the fact, and said, that he was present when it took place; and he was asked where he lived at the time, and he answered, near the parties, and it was proved, that he did not live in the state at the time, it was held, that it was not swearing to such a ma-

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terial fact as would constitute perjury, though false. *Ib.*

PLEADING.

See Assumpsit 7. *Evidence* 7. *Malicious Prosecution* 5, 6, 7, 8. *Prohibition* 4, 5, 6.

1. If a plaintiff sue as executor or administrator, he must make proof of his letters testamentary, or of administration; and defendant must pray over, and make such objections thereto as he like; or if no proof be made, he must demur.—*Trappier vs. Mitchell*, 64
2. But if the defendant plead the general issue, he admits the plaintiff properly in court. *Ib.*
3. Where a party sues in the right of another, as executor, &c. the defendant, if he wish to make any objection, because others are not joined, he must plead it in abatement, and the court will not grant a nonsuit; but if he sue in his own right, the non-joinder of others may be the cause of nonsuit.—*Gordon vs. Goodwyn*, 70
4. The declaration for a tort, should describe the property or thing affected with as much certainty as will enable the defendant to see clearly and distinctly to what he is to answer; and when that purpose is attained, the object of description will be fully answered.—*Teague vs. Griffin*, 95
5. In an action of trover for a negro slave, the name is not an indispensable part of the description, *ut semble*; and after verdict, the omission cannot be made a ground in arrest of judgment. *Ib.*
6. A license to enter cannot be given in evidence under the general issue, in trespass *quare clausum fregit*, but must be pleaded.—*Gambling vs. Prince*, 158
7. A. brought an action against B. for the conversion of a quantity of cotton, and obtained a verdict; and afterwards commenced another action for the conversion of a part of the same

cotton; *Held*, that the former recovery was a good plea in bar to the second action.—*Bates vs. Quattlebom*, 205

8. The plea of *non est factum*, simply puts in issue, the existence of the obligation.—*State vs. Mayson*, 425
9. A defendant will not be allowed to plead *non est factum*, and demur also. *Ib.*
10. Where a defendant pleads *non est factum* to an arbitration bond, the amount of damages is not put in question.—*Graham vs. Allen*, 492
11. After an interlocutory order for judgment has been set aside, and the defendant has plead the general issue, he will not be entitled to plead in abatement, or have the benefit of that plea in his defence.—*Ferguson vs. King*, 588

POSSESSION.

See Title 2, 3, 4. *Trespass* 5.

1. Possession alone will not enable the plaintiff to maintain trespass against the rightful owner. *Skinner vs. M'Dowall*, 68

PRACTICE.

1. When a criminal case is put to the jury, it cannot be withdrawn, except by the consent of the accused, or by some unavoidable accident, to one of the jury or the court.—*State vs. Edwards*, 15
2. After judgment had been entered up, and execution issued, without the costs being inserted in either, the court may give leave to the party to amend, by inserting the costs. *O'Driscoll vs. M' Burney*, 58
3. Where a person, against whom a bill of indictment has been found for a forcible entry, traverses the force, a writ of restitution will not be granted, till the question of force be tried; but the defendant will not, as a matter of course, be allowed a term, as in other misdemeanors.—*State vs. Dayley*, 121

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4. The court, in its discretion may give leave to one of several plaintiffs to discontinue, where it appears, he has no interest in the cause.—*Hawkins vs. Lewis*, 141
5. Where a defendant has placed the copy of a sum. pro. with an attorney, with instructions to make a defence, and the attorney neglects to enter an appearance, and judgment goes against defendant by default, the court will not set aside the proceedings and permit him to enter an appearance after the adjournment of the court.—*Schroder vs. Eason*, 291
6. A landlord brought an action on the case against his tenant for waste committed on the premises, and the declaration contained a count in trover for the conversion of a quantity of plank, &c. Plea, not guilty, and verdict for the landlord for eight dollars, ruled, that the plaintiff was not entitled to costs unless he recovered 20l. currency, as the right and title of property was not put in issue.—*M' Cullough vs. M' Cullough*, 361
7. On an appeal from the ordinary, to the court of common pleas, it was referred to a jury to try the validity of the will; the jury found a verdict and established the will, on which the appellant's counsel entered up judgment and issued execution for costs, which on motion was set aside by the court.—*Denton et ux. vs. English*, 376
8. Where a motion is made to consolidate two actions on two promissory notes, which joined, would exceed the jurisdiction of the city court, after verdict the motion will be refused.—*Planters and Mechanics Bank vs. Cowing & Wagner*, 438
9. The court, after verdict, will not strike out one of the defendants, on the ground, that he is not within the jurisdiction of the court. *Ib.*
10. Where several actions are brought on notes, all drawn by the defendant, all made to the same person and endorsed by him to the bank, they will, on motion, be consolidated; but where one of the notes has another endorser; the motion will be refused. *Planters and Mechanics Bank vs. Cohen, n.* 440
11. Where a defendant (who is likewise an attorney) neglects to enter an appearance at the first court, for the purpose of taking advantage of a supposed inaccuracy in the writ at the second court, and an order for judgment is obtained, it will not afterwards be vacated for the purpose of permitting him to put in a plea. *Donlevy & Co. vs. Cooper & Co.* 548
12. Accepting the service of a writ will not be considered as an appearance; it does nothing more than dispense with the service of the sheriff. *Ib.*
13. Where a bill is given out for a libel against a person, and the grand jury returns, "no bill," he is not entitled, as a matter of course, to a discharge from his recognizance, but the solicitor may prefer a new bill against him without assigning any cause. *State vs. Fitch*, 558
14. Where an action of trespass is commenced against A. and B. and a verdict is found against A. but B. is found not guilty; B. is entitled to tax his costs against the plaintiff. *Trapp vs. M'Kenzie*. 571

PRESUMPTION.

See Deed 2.

PROFERT.

See Pleading 1, 2.

PROHIBITION.

1. A prohibition may issue upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that ju-

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isdiction, but to the cognizance of some other court.—*State vs. White & Sadler*, 174

2. A prohibition will not lie to an inferior court after sentence, unless the want of jurisdiction appear on the face of the proceedings. *Ib.*

3. No prohibition lies to restrain the proceedings of a court martial for irregularities, as long as it acts within its jurisdiction.—*State vs. Wakely*, 410

4. Where a declaration in prohibition sets forth, that in the trial of a negro slave, by justices and freeholders under the act of 1740, unauthorized individuals had tried the slave, and that testimony was received on the trial, in opposition to the rules of the common law; to which there was a general demurrer; *Held*, that the plaintiff must have judgment, and a writ of prohibition issue as the demurrer, admitted the truth of facts on which a prohibition ought to be awarded. *State vs. Hudson*, 419

5. It is not necessary that the ground on which the prohibition is awarded, should arise on the face of the proceedings of the inferior court. *Ib.*

6. Where the matter suggested for a prohibition, appears on the face of the proceedings of the inferior court, an affidavit of the truth of the suggestion is unnecessary; where it does not so appear, it is essential, that the suggestion should be verified by affidavit. *Ib.*

RECOGNIZANCE.

1. A recognizance to support a bastard child, though not taken according to the act of assembly, may be good at common law.—*State vs. Mayson*, 425

REPLEVIN.

See Patrol.

1. Where a writ of replevin is lodged with the sheriff, who retakes part of the goods, and returns *elongata* as to the rest,

a *Withernam* may issue.—*M'Colgan vs. Huston*, 444

2. An *alias* and *pluries* are unnecessary in this state, as a writ of replevin is a returnable writ; and therefore on the return of *elongata* on the original writ, a *Withernam* may issue. *Ib.*

3. Where property taken by a *Withernam* is claimed by a third person, the court will not on motion of the claimant, decide on a contested right. *Ib.*

RETAILING.

See Slave 10.

1. On an indictment for retailing spirituous liquors, without a license, it must be proved, that the defendant sold the liquor in person, or authorized the sale of it.—*State vs. Borgman*, 54

2. *Query?* Is a single act of vending sufficient proof of retailing spirituous liquors, without a license? *Ib.*

3. The proceeding by indictment is authorized by the act, to prevent retailing spirituous liquors without a license, and is the proper remedy.—*State vs. Holfrid*, 233

4. The acts of 1784 and 1801, to prevent retailing without license, have always been regarded *pari materia*.—*State vs. Van Evour*, 309

ROBBERY.

1. Where a number of persons have associated together to commit an unlawful act, *i. e.* to commit a robbery, and one only perpetrates the act, all the company are guilty.—*State vs. Heyward*, 312

SALE.

See Assumpsit 1, 2, 3. Executor & Administrator. Sheriff & Sheriff's Sale 7, 8, 10, 11. Warranty. Witness 3.

SET OFF.

See Discount.

SHERIFF & SHERIFF'S SALE.

See Fieri Facias. Title 1, 6, 7.

1. Where a sheriff neglects to

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- take bail, according to the exigency of the writ, he is not entitled to the benefit of the act, allowing the common bail an exemption from liability until a return of *non est inventus* on a *ca. sa.* against the principal. *Sims vs. Tarrant*, 123
2. The sheriff is a mere ministerial officer, and is justifiable in serving a foreign attachment though the defendant may have been in the state at the time the writ was issued.—*Swanzy vs. Hunt*, 211
3. No person can take advantage of a fraudulent deed, but creditors and purchasers; but the sheriff in attaching property of a debtor, in the possession of a third person, to whom it had been fraudulently conveyed, is considered as the lawfully authorized agent of the creditors. *Ib.*
4. Under the act of 1785, the sheriff is authorized, in serving a domestic attachment, to take possession of goods of the defendant found in the possession of a third person.—*Wulton vs. Drignan*, 248
5. A. moved for a rule on the sheriff to show cause why he should not be ordered to pay over to him money which he had collected for him on execution: The sheriff showed for cause, that he had levied an execution which he had in his hands against A. on the money, and had paid it over to the plaintiff in that execution: Rule discharged.—*Summers vs. Caldwell*, 341
6. Where the sheriff has collected money on execution for a plaintiff, the court can order it to be paid over on an execution in the sheriff's hands against the plaintiff. *Ib.*
7. The sheriff cannot sell personal property until it has been reduced into possession.—*Collins vs. Montgomery*, 392
8. Where a negro had been levied upon by a former sheriff, who had not delivered him to his successor in office, who sells the negro, when he is not present, the sale is void. *Ib.*
9. Where a rule is served on the sheriff, for not making money on a *fi. fa.* he cannot defend himself by objecting to the manner in which the verdict against the defendant was recorded.—*Graham vs. Allen*, 492
10. Where a person purchases property at sheriff's sale, at which the owner was present, it will not be presumed, that he purchased as the agent of the owner, without strong testimony.—*Exara. Rogers vs. Evans*, 563
11. A sheriff's sale of personal property need not be evidenced by a return on the *fi. fa.* or a bill of sale from the sheriff, but may be established by parol testimony. *Ib.*
- ## SLANDER.
1. Words charging a woman with a breach of chastity, are not actionable, unless special damages be proven.—*Wilson vs. Lyles*, 204
2. To say of a woman, "I caught Lucy W— in bed with Ephraim M—," is not actionable. *Ib.*
3. It is not actionable to say of a man, "he swore a d—d lie before 'Squire Lunkin,'" and that "he was forsworn, and that he (the defendant) would overthrow his oath, so that it should never hurt a negro."—*Ashball vs. Witt*, 364
4. Where words are not actionable, without a *colloquium*, of which no evidence is given, the case will not be referred to the jury; but the court will nonsuit the plaintiff. *Ib.*
5. Words are to be construed by a court and jury in the same manner as they were or ought to be construed or understood, by the person to whom they were spoken.—*Eifert vs. Sawyer*, 511
6. A person may convey a charge of felony as well by way

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of question as by direct allegation, and it must always be a question of construction, whether such is his meaning or not.

7. In an action of slander, evidence of the plaintiff's general bad character is admissible in mitigation of damages; but evidence of a particular crime of a distinct character from that with which he is charged, committed by the plaintiff, is inadmissible.

1b.

SLAVE.

See Indictment 1.

1. On an indictment for inveigling, stealing, or carrying away, a negro slave from his owner or employer, it is not necessary to prove the act of *inveigling*, to consummate the felony of *stealing or carrying away*.—*State vs. Miles*, 1
2. A legal possession of the owner is sufficient, without his having actual possession; as during the time, that the slave has run away, &c. *1b.*
3. The jury in such a case, cannot find the prisoner guilty of *petit larceny*. The act has made it a specific felony, without clergy. *1b.*
4. It is immaterial whether the property sold by a slave, contrary to the act of 1817, to prevent illicit trading with negro slaves, be the property of the slave, of his master, or of any other person.—*State vs. Anone*, 27
5. The owner or master, sending a slave with goods, on purpose to entrap the person who might trade for them with the slave, and standing by, to see the act of trading, or otherwise to detect the illegal traffic, and not forbidding or sanctioning the transaction, does not thereby legalize such trading. *1b.*
S. P. State vs. Stroud, n. 34
6. Where defendant had been in the habit of trading with slaves, without a permit, and had authorized his clerks so to trade, and knew that his negro

slave (whom he also kept as a clerk in his store) had traded in the same manner, in his shop, to which he made no objection, it is sufficient evidence to presume, that he was so authorized by his master, as to make the latter liable for the penalty. *1b.*

S. P. State vs. Borgman, n. 34

7. The law does not require the master of a slave to state in a pass, to what place the slave shall go. It is sufficient if it express a leave of absence for a particular time.—*Hogg vs. Keller*, 113
8. A stealing of a slave may be committed by another slave, although no force be employed.—*State vs. White & Sailer*, 174
9. The act of 1754, making it felony without benefit of clergy, "to inveigle, steal, or carry away any negro or slave," &c. applies to negroes as well as white persons. *1b.*
10. A person who sells liquor to a negro without license, may be convicted under the act of 1784, for retailing without a license, and under the act of 1817, for trading with a negro without a ticket, for the same act of selling.—*State vs. Sommerkalb*, 286

SOLE TRADER.

See Baron & Feme 4.

SOLICITOR.

See Practice 13.

TENANT.

See Jury.

TENDER.

1. Nothing but gold or silver is a legal tender, under the constitution of the U. States. *M'Clarin vs. Nesbitt*, 519

TITLE.

See Possession. Trespass 1. 2. 6.

1. To make out a title to personal property under a sheriff's sale, the production of the ex-

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execution, under which the property was sold, is indispensable.—*Vance vs. Reardon*, 299

2. Five years actual adverse possession of a tract of land under a junior grant, will give the tenant a title to so much as he has in actual possession, even against a person who has a paramount title, and is in the constructive possession of the part in dispute.—*Middleton vs. Dupuis*, 310

3. In an action of trespass to try title, the occasional cutting of timber and the exercise of such other acts of ownership over it, as men are accustomed to do over woodland, is not such a possession as will divest the owner of his right to the soil under the statute of limitations.—*Bailey vs. Irby*, 343

4. The possession that will give a title under the statute of limitations, must be an actual occupancy, a *pedis possessio* definite, positive and notorious. *Ib.*

5. Where a person goes into the possession of land, under a conditional agreement to purchase it, he cannot hold adversely to the claim of the person under whom he went into possession, so as to acquire a title by the statute of limitations.—*Richardson vs. Broughton*, 417

6. Where a person claims land under a sheriff's sale, the judgment and execution, under which the land was sold, must be adduced. *Ib.*

7. Where a purchaser at sheriff's sale does not record his title, it will not affect the title of a subsequent purchaser at sheriff's sale, without notice of the first purchaser's title.—*Harrison vs. Hollis*, 578

TRESPASS.

See Title.

1. An action of trespass, *quare clausum fregit*, can be maintained for a trespass upon an uncultivated and uninclosed part of an entire tract of land,

of which the plaintiff is in actual possession, though not of the part trespassed on; and even without any written evidence of title.—*Gambling vs. Prince*, 138

2. In such an action, title does not necessarily come in question. *Ib.*

3. Hunting on uninclosed lands is not such a trespass as will support an action of trespass *quare clausum fregit*; nor will the owner's forbidding it, vary the case.—*Broughton vs. Singleton*, 338

4. The officers who compose a court martial, are not liable to an action of trespass, for seizures under their sentence, unless malice or corruption be proven.—*Macon vs. Cook*, 379

5. In an action of trespass *quare clausum fregit*, plea *liberum tenementum*, and a verdict for the plaintiff, the plaintiff is not entitled to a writ of *habere facias possessionem*.—*Grimke vs. Brandon*, 382

6. Continued systematic trespasses by a person, in cutting down trees and carrying off timber, cannot give him a title to land by possession, under the statute of limitations. *Ib.*

TRESPASS TO TRY TITLE.

See Possession. Trespass.

1. The defendant, in an action of trespass to try title, cannot, after a recovery against him, in turn become plaintiff, and sustain a second action to try title.—*Thomas vs. Geiger*, 528

TROVER.

See New Trial 1. Pleading 4, 5.

TRUST.

See Frauds 2.

1. A court of law cannot notice a resulting trust; it belongs exclusively to the court of Equity.—*Harrison vs. Hollis*, 578

VENDUE.

See Assumpsit 1, 2, 3.

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VENDUE MASTERS.

1. The act of 1815, with regard to vendue masters, is not unconstitutional. — *Burnett vs. Ballant & Sarzedas*, 43
2. The act of 1815, embracing debts due on account of sales made since the passing of the act. *Ib.*
3. To render a firm liable as vendue masters, it is not necessary, that they should have taken out a license in their joint character as partners. *Ib.*

VERDICT.

See New Trial 1, 2, 3, 8.

1. Unless a verdict is clearly and manifestly against evidence or wholly without evidence, the court will not set it aside. — *State vs. Fisher*, 261

WARRANTY.

See Assumpsit. Damages 1, 2, 3, 7. *Evidence* 7. *Witness* 3.

1. A sound price implies a sound commodity; and though the discovery be made in a foreign port, yet an action will be supported to recover back for the failure of consideration. — *Misroon & Timmons vs. Waldo & Freeman*, 76
2. It is not only the civil law rule, but the view of the common law, which has always been adopted in this state, *ut semel*. *Ib.*
3. The doctrine of implied warranties, relates as well to sales at auction, of executors and administrators, and others, acting in a representative capacity, as at other sales by individuals. But the executor or administrator is not liable himself, unless for misrepresentations: The estate alone is liable. — *Duncan vs. Bell*, 153
4. In an action of assumpsit on an implied warranty of a horse, a slight or temporary defect will not warrant the rescission of the contract or the recovery of the price paid. — *Rivers vs. Gragget*, 265
5. Where a vendor gives a writ-

- ten warranty of soundness of a negro, which afterwards is found to be unsound, it is immaterial whether the vendee knew of the unsoundness or not: it is a mere matter of contract, and the vendee is entitled to recover the difference between the value of the negro, if sound, and his actual deterioration by the unsoundness. — *Wallis vs. Frazier*, 516
6. Where a warranty of the soundness of a negro is given, which afterwards proved to be injured from 25 to 30 per cent. by disease, and the jury give mere nominal damages, a new trial will be awarded. *Ib.*
7. Selling for a sound price, raises an implied warranty of the soundness of property. — *Rose & Rogers vs. Beattie*, 538
8. Where a person purchases an article, capable of inspection, as rice, cotton, &c. he is considered as having purchased on his own judgment: But the article must correspond throughout, with the sample exhibited: and where the external part of a bag of cotton appears good, and the interior is injured by water having been poured on it, the purchaser will be entitled to damages. *Ib.*

WILLS.

See Executor and Administrator 2.

1. The degree of "burning, cancelling, tearing, or obliterating," necessary to the revocation of a will, according to the statute of frauds, must depend on the circumstances of the case. — *Johnson vs. Brailsford*, 272
2. Where a will has been interlined, and crossed in places, and the seals torn, and the jury find that it was done *animo revocandi*, this is a sufficient revocation. *Ib.*
3. The slightest "burning, or tearing," &c. of a will, accompanied with satisfactory evidence drawn *aliunde* of the intention of the testator to re-

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voke, will satisfy the statute and act as a revocation. *Ib.*

4. Our act of assembly uses the word, "destroying," instead of the words "burning, cancelling, and tearing," in the statute of frauds, but the construction is the same. *Ib.*

5. Where a person has torn off the seals of a will, interlined it, &c. *animo revocandi*; and it appears he afterwards intended to make another will which he never executed, this will not re establish the will. *Ib.*

6. A devise of land without words of perpetuity, and where there is nothing in the will from which a fee can be raised by implication, vests only a life estate in the devisee.—*Hall vs. Goodwyn*, 383

7. The word, "estate," in a will cannot be transferred from the preamble to the devising clause, so as to extend a life estate to a fee, where the introduction and the devising clause are in no way connected. *Ib.*

8. Where a man devised lands to his daughters, (in 1782,) who were aliens, they are entitled to take by descent, being protected in their rights by the treaty of 1792, 9th Art. which declares, that British subjects shall hold as before the war.—*Duncan vs. Beard*, 400

9. Where a testator duly executes a will, which he permits to survive him, it will not be revoked by a subsequent will, which he has cancelled, or one not drawn *animo testandi*.—*Taylor vs. Taylor*, 482

10. No particular form is required for a will; whether a paper is to be considered as a will or not, depends upon the intention of the maker, which is to appear either from the paper itself or from extrinsic testimony.—*Lyles vs. Lyles*, 531

11. It is not indispensable, that a testator should originally have executed a paper as,

and for, a will, provided he afterwards adopts it as such. *Ib.*

12. Where it is not evident from the intrinsic appearance of an instrument, that it is a will, and it is admitted, that the maker did not originally execute it as his will, and but little evidence, that he afterwards changed his mind, and the jury have decided, that it was not his will, the court will not grant a new trial. *Ib.*

13. Where a will was thirty-three years old, and had been proved before the ordinary, and the hand writing of the testator and subscribing witnesses proved, although no evidence was given of possession under the will, or that the witnesses were dead or out of the state; *Hela*, that it was sufficient evidence, upon which a jury might find the will to be genuine.—*Ferguson vs. King*, 588

14. Where a testator, by will, gives his executors a power to sell his land for the benefit of his heirs, or to divide and allot the land amongst them, the executors are nothing more than attorneys or commissioners to sell, and the fee simple of the land vests in the heirs until the executors make the sale or division, agreeably to the will. *Ib.*

WITNESS.

See Evidence 15, 17. *Perjury* 3.

1. The witness, and not the court, has the right to judge of the tendency of a question put to him, whether it will criminate him or not.—*State vs. Edwards*, 15

2. The court will always so instruct a witness, as to enable him, if he possess any understanding, to determine, whether he may be jeopardized by his answer; and, if the answer may form one link, in a chain of testimony, against him, he is not bound to answer. *Ib.*

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3. A. sold a horse to B. and B. to C. A. is a competent witness in an action between B. and C. as to the soundness of the horse, though the law implies a warranty of soundness on all sales, where a full price is given.—*Duncan vs. Bell*, 153
4. A witness is admissible to prove, that he had criminal conversation with the wife previous to her seduction by the defendant, where the witness himself does not object to give such testimony.—*Torre vs. Summers*, 267
5. On an indictment, where a witness is entitled to a part of the penalty, he is a competent witness, if he releases his interest. *Ib.*
6. Where a witness has gone through his testimony and it is then discovered, that he is interested, he will be competent, if he release his interest; and he may be re-examined. *City Council vs. Haywood*, 308
7. Interest, which goes to the competency of a witness, is a question to be determined by the court, but influence which only affects the credibility, is a matter for the jury. *Ib.*
8. An informer, unless saved by the statute, or from the necessity of the case, is not a competent witness.—*Ede Van Esvour ads. The State*, 309
9. Where a person, who is a witness to a particular transaction, has made a memorandum at the time of certain facts for the purpose of perpetuating the memory of them, and can at any subsequent period swear, that he had made the entry at the time for that purpose, and that he knows from that memorandum, that the facts did exist, it will be good evidence, although the witness does not retain a distinct recollection of the facts themselves. *State vs. Rawls*, 352
10. Where, on an indictment for gaming, the prosecutor was unable to testify to particular facts, except from seeing them in an affidavit made by himself, at the time that he had seen the offence committed, the evidence was held admissible. *Ib.*
11. Where the prosecutor acknowledged, that he did not know the defendant, but that two persons with whom he was gaming, called him by a particular name to which he answered, and he plead to the indictment by that name, and found guilty, the court will not grant a new trial on the ground, that he has not been sufficiently identified. *Ib.*
12. Where a witness called to prove the handwriting of a subscribing witness to a collud, could not undertake to say, that he had ever seen the subscribing witness write, but that from his having been a notary public, he had seen much of his acknowledged writing, it was held sufficient. *Dunkin vs. Beard*, 406

FINIS.

Ex. B. A. A.

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ERRATA.

Page. Line.

- 19 1 for "might" read *may*.
- 33 1 strike out "of" after *face*.
- 63 16 for "bar" read *law*.
- 78 8 for "English" read *England's*.
- 122 27 for "restitution" read *rerestitution*.
- 163 15 for "to release" read *a release*.
- 18 9 from bottom, for "extended" read *excluded*.
- 188 11 from bottom, after "action" insert *of*.
- 229 3 from bottom, for "us" read *this*.
- 243 last line, for "them" read *thence*.
- 247 2 strike out "be required."
- 14 for "disposes" read *dispenses*.
- 260 20 after "months" insert a period.
- 21 after "estates" strike out the *period*, and insert a *comma*.
- 333 25 after "tender" insert *of*.
- 26 for "prove" read *produce*.
- 334 last line for "than" read *then*.
- 340 19 for "enclosed" read *uninclosed*.
- 369 last line, for "properly" read *probably*.
- 387 26 for "not" read *now*.
- 400 11 for "perat" read *percat*.
- 17 before "his" insert *and*.
- 409 11 after "met" insert *may*.
- 517 2 from bottom, after "made" insert a period.
- 530 6 from bottom, for "submitted" read *substituted*.
- 528 12 strike out "and Richardson."

